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In the

Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 594 F. 2d 623. It is reproduced in the Appendix hereto ("App").

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 16, 1979. Petition for Rehearing En Banc was denied April 24, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Illinois Compulsory Retirement of Judges Act, Ch. 37, Ill.Rev.Stats. (1977), §§ 23.71, 23.72, which provides for mandatory retirement of elected Illinois judges at age 70 and thus denies, by reason of age, judicial candidate access to the ballot and elector opportunity to vote for such candidates, violates the rights of such disqualified judges and voters under the equal protection clause of the Fourteenth Amendment and the First Amendment?

2. Whether the Illinois Compulsory Retirement of Judges Act violates the equal protection clause of the Fourteenth Amendment because of the classification contained in § 2 of the Act which suspends the Act with respect to judges in office on July 20, 1965, the effective date of the Act, and certain judges in office on June 30, 1973?

STATUTES AND CONSTITUTIONAL PROVISIONS ALLOWED

The Illinois Act in issue is appended [redacted] under which disqualification of Illinois judges by reason of age is mandated. Ch. 37, Ill. Rev. Stats. (1977) §§ 23.71, 23.72; Laws 1965, p. 1792, §1, and §2 eff. July 20, 1965, as amended by Public Act 78-805, §1, effective September 12, 1973.

The Illinois Constitution of 1970, Article VI [redacted] establishes normal qualifications for judicial office

and sets forth the requirements and procedures for election and retention election. It further permits the General Assembly to provide by law for retirement of judges at a prescribed age. It further provides machinery for removal of a judge found physically or mentally unfit to perform his duties.

Finally, the Fourteenth Amendment to the United States Constitution is relied on [redacted] as is the First Amendment.

STATEMENT OF THE CASE

Jurisdiction was asserted in the District Court based upon 28 U.S.C. §§1331, 1343(3), 1343(4), 42 U.S.C. §1983, the First and Fourteenth Amendments to the United State Constitution (and the pendent jurisdiction of the Court for claims not pertinent here). Declaratory relief was sought pursuant to 28 U.S.C. §§2201 and 2202.

1. Nature of the Case and Proceedings Below.

Two classes of Plaintiffs-Petitioners (hereinafter "Petitioners"") filed the Complaint herein, seeking declaratory and injunctive relief. The Judge Plaintiffs-Petitioners (hereinafter "Judge Petitioners")[1] brought suit on behalf of all judges of the Supreme, Appellate and Circuit Courts of Illinois, who are or will be subject to mandatory retirement under Illinois law at age 70 before the end of their certified terms of office, and who will be deprived of the right to run for re-election or retention election to judicial office because they have attained the age of 70. The Voter Plaintiffs-Petitioners (hereinafter "Voter Peti-

[1] Judges Trafelet, Canel, Carey and Nelson.

tioners")[2] brought suit on behalf of all registered voters of the State of Illinois who are or will be denied the opportunity to vote for the judicial candidates of their choice because they are or will be subject to mandatory retirement at age 70. The District Court certified both classes.

Count I of the Second Amended Complaint is the only Count pertinent here. It asserts that the Illinois Compulsory Retirement of Judges Act (hereinafter "the Act") violates the Equal Protection Clause of the United States Constitution, Fourteenth Amendment, in pertinent part because it disqualifies elected judges from holding office or running for reelection or retention after they attain age 70 and bars voters from voting for those judges; and further because the Act discriminates in its application to elected judges depending on their date of original election. Petitioners asserted that strict scrutiny was the required test under the Fourteenth Amendment because the Act operated to bar ballot access and voter choice.[3]

The District Court took evidence and entered Findings of Fact and Conclusions of Law on which judgment for defendants was entered. The Seventh Circuit Court of Appeals affirmed.

Judge Petitioners all held office as elected judges when the suit began. Because the Act mandated their retirement in December of 1978, and the disqualification of all of them to run for retention (as Judge Canel sought

[2] Petitioners Fitzpatrick, Williams and Lewis.

[3] Alternatively, it was asserted that if the rational relation test was applicable, the Act did not meet that test. That question and pendent claims alleged under Illinois law are not asserted as issues in this Petition.

to do that month) or reelection then or ever, they sought but were denied injunctive relief in the District Court and injunctive relief pending appeal. Likewise, their motion for expedited appeal was denied below. Accordingly, they all became disqualified in December of 1978, and lost office before the appeal was decided.[4] Petitioners sought a declaration that the Act violates the United States Constitution and a declaration that the Judge Plaintiffs are not disqualified from holding judicial office and seeking reelection to such office. Thus, should the judgment below be reversed, the declaratory relief requested would result in those ousters being declared void, and their rights to run for reelection restored.

2. Statement of Facts Pertinent to the Petition.

In 1965, the Illinois General Assembly approved mandatory retirement for judges at age 70.[5] Section 1 of the Act provides for judicial retirement immediately following the attainment of age 70.[6] Section 2 suspends the effect of mandatory retirement for judges in office in 1965 until eighteen years of judicial service, January 1, 1976 or age 70, whichever occurs last.

[4] Judge Canel was denied the right to run for retention election. The other judges, whose terms extended beyond that date, lost their offices.

[5] The 1970 Illinois Constitution authorizes the General Assembly to provide for the retirement of judges: "The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. . . ." Art. VI, § 15a.

[6] Retirement occurs on the first Monday in December following the general election after the judge's 70th birthday. Section 1 of the Act.

In 1973 the General Assembly amended the Act (§2) to suspend its effect on "any Judge in office on June 30th, 1973" who could not fulfill minimum pension requirements upon becoming 70. According to the evidence, the purpose of the Amendment was to insure that loyal party performers would obtain minimum pensions.

No other Illinois State official is disqualified from completing the term of an elected office or seeking reelection because of a maximum age limit. No person is disqualified from seeking any other Illinois elected office because of attaining a maximum age.

Prior to 1976 approximately four judges were mandatorily retired. In 1976, twenty-nine judges were mandatorily retired pursuant to Section 1.

Since 1965, approximately forty-two judges have been excluded from the effect of the mandatory retirement provision by Section 2 of the Act. After the November, 1978 elections, fifteen of these judges remain on the bench, some of them until 1984, at which time they will be in their late seventies or early eighties.[7]

The named Voter Petitioners are three registered voters of Cook County, Illinois, who have voted for the named Judge Petitioners, and who desire to vote for Judge Petitioners in the future and for the election and retention in future elections of other judges in the class of Judge Petitioners.

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[7] A sixteenth judge, eligible to serve until 1980 and age 77, did not win retention, and was retired by the voters.

In Illinois eligible[8] persons are elected to the offices of Supreme, Appellate and Circuit Court judge. Initially, every candidate must seek election through the political process. An elected judge may seek to succeed himself by filing with the Secretary of State a Declaration of Candidacy before the election preceding the expiration of his term of office. A judge seeking "retention" election in this manner must receive the affirmative vote of three-fifths of the voters. While this method of reelection is preferred by judges, nothing in Illinois law bars a judge from seeking reelection through the normal political process, except for the Act in issue here which may disqualify a judge.

The Act in issue here clearly operates to disqualify any person, whether or not a sitting judge, from running for office initially, or running for reelection or retention, if that person has reached age 70, unless protected by Section 2 of the Act. Through such disqualification, the Act thereby stops voters from organizing to support and from voting for judicial candidates of their choice who have attained that age.

REASONS FOR GRANTING THE WRIT

Introduction

With respect to laws mandating age retirement of non-elected public employees, this Court has made clear that equal protection scrutiny is governed by the "rational relationship" test. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520

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[8] Eligibility requires that the individual be a United States citizen, a licensed attorney-at-law of Illinois, and a resident of the judicial unit which selects the individual. Art. VI, §11, Illinois Constitution of 1970

(1976); and *Vance* v. *Bradley*, ... U.S. ....., 99 S. Ct. 939, 58 L. Ed. 2d [redacted] (1979). But a number of decisions of this Court and the Circuit Courts, the latest being *Illinois State Board of Elections* v. *Socialist Workers Party*, ... U.S. ....., 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), have held that any legislative classification that limits voter choice and candidate ballot access is subjected to a strict scrutiny standard. In this case, an Illinois statute is confronted which mandates disqualification for reelection and requires retirement of elected judges who attain age 70. Thus, the first question posed is whether the *Murgia-Vance* standard applies because age is the classification, or whether the *Socialist Workers* standard governs because the law bars access to the ballot and voter rights.

The Seventh Circuit decision is in conflict with *Socialist Workers* and other decisions of this Court and other Courts of Appeal wherein classifications that restricted ballot access and voter choice were reversed under a standard of strict scrutiny. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968); *Bullock* v. *Carter*, 45 U.S. 134, 92 S.Ct. 849, 31 L. Ed. 2d 92 (1972); *Communist Party* v. *Whitcomb*, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974); and *Storer* v. *Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 714 (1974). Further, in a democracy, any law that bars large numbers of qualified persons from public elected office because of maximum age restrictions poses an important public and constitutional issue that should be resolved by this Court.

A further question is posed by that aspect of the Illinois law which places certain judges in a more favorable posture than others, depending on their date of election (before 1965, the original law, or before 1973 in

the case of the 1973 amendment). Thus, many judges in Illinois remain eligible to remain in office and run for reelection until they reach their late 70's or early 80's in age.

The Seventh Circuit decision below is the first in which any court has applied principles which upheld so-called "grandfather clauses" of classification in cases of economic regulation, so as to permit classification between persons eligible to hold and run for public elected office. Again, such holding conflicts with the decisions imposing strict scrutiny to classification barring ballot access and voter rights, and conflicts with prior authority controlling "grandfather clauses" in economic cases. Finally, the issue of whether some people can be "grandfathered" into public office over others similarly situated who are disqualified, is one of great public and constitutional importance in a democracy.

For those reasons, more fully discussed below, the Writ should be granted.

I.

SECTION 1 OF THE ILLINOIS COMPULSORY RETIREMENT OF JUDGES ACT IS INVALID UNDER EQUAL PROTECTION AND THE FIRST AMENDMENT.

The Court below misapprehended the standards for review consistently asserted by Petitioners below. As shown by the Complaint they consistently asserted that (1) because the Act manifestly denies judges over 70 access to the ballot for retention or reelection, and denies voters rights to vote for candidates of their choice if those candidates are over 70, that Act is subject to strict scrutiny; but that (2) the Act also

falls under the rational relation test applied by the U. S. Supreme Court to age retirement statutes which did not cover elected officials. Thus, it was not accurate for the Panel to conclude that "the plaintiff judges here concede that the rational relationship standard is applicable and contend only that the Court failed to apply the correct standard properly." 594 F.2d 623 at 626.

The decision below referred to the decision of this Court just rendered in *Illinois State Board of Elections* v. *Socialist Workers Party,* ..... U.S. ....., 47 LW 4197 (Feb. 22, 1979), wherein the Illinois requirement for minimum signatures on petitions by independent candidates was held violative of the Fourteenth Amendment, and commented:

> Although language in that case, 47 U.S.L.W. at 4200, could be read as subjecting any classification that limits voters' choices, in whatever manner or however incidentally, to a strict scrutiny standard, we interpret that language as referring to the situation before the Court in that case and not as withdrawing *sub silentio* the statement in *Bullock* that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143. It was consistent with that statement to apply the strict scrutiny standard to a classification that "impairs the voters' ability to express their political preferences." 47 U.S.L.W. at 4200. In both *Bullock* and *Illinois State Board of Elections,* the classification burdened identifiable groups of candidates or voters, identifiable in one case by their economic status and in the other by their political preferences. 594 F2d 623 at 632.

Referring to prior Circuit opinions that it understood to support its reading of the Supreme Court opinion,

the Court below overlooked other precedent as well as the reasoning of this Court.

Socialist Workers was based on a vital premise:

> Restrictions on access to the ballot burden *two distinct and fundamental rights,* "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. (Emphasis added.)

Socialist Workers, Id, 47 U.S.L.W. at 4200, citing *Williams* v. *Rhodes,* 393 U.S. 23 at 30 (1968). This Court amplified its view of those "fundamental rights" which require strict scrutiny and must be justified by a "compelling state interest":

> The freedom to associate as a political party, a right we have recognized as fundamental, see id., at 30, 31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin* v. *Panish,* 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964); *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964); *Dunn* v. *Blumstein, supra,* at 336.
>
> *When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. American Party of Texas* v. *White,* 415 U. S. 767, 780-781 (1974); *Storer* v. *Brown,* 415 U. S. 724, 736 (1974); *Williams* v. *Rhodes, supra,* at 31. To be sure, the Court has

previously acknowledged that States have a legitimate interest in regulating the number of candidates on the ballot. * * [Citing *Lubin* v. *Panish, supra,* and *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972)] * * *

Consequently, we have upheld properly drawn statutes that require a preliminary showing of a significant modicum of support" before a candidate or party may appear on the ballot. *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971); see, e.g., *American Party of Texas* v. *White, supra.*

However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." Kusper v. *Pontikes,* 414 U. S. 51, 59 (1973), *and we have required that States adopt the least drastic means to achieve their ends. Lubin* v. *Panish, supra,* at 716; *Williams* v. *Rhodes, supra,* at 31-33. *This requirement is particularly important where restrictions on access to the ballot are involved. Socialist Workers,* Id, 47 U.S.L.W. at 4200. (Emphasis added.)

Finding that the Illinois Legislature had not used "the least restrictive means of protecting the State objectives," the Illinois signature requirement was stricken. In his concurring opinion, Mr. Justice Blackmun made clear that he read the majority opinion to constitute a "strict scrutiny approval for election cases" in which he joined. Id, 47 U.S.L.W. at 4201.

The ruling in *Socialist Workers* was anticipated by similar statements from Chief Circuit Judge Swygert in the Seventh Circuit and in recent opinions by the First and Fifth Circuits.

In *Blassman* v. *Markworth,* 359 F. Supp. 1 (N.D. Ill., 1973) (three Judge panel), a case in which a *minimum*

age qualification for school board candidates was upheld, Chief Circuit Judge Swygert stated in his concurring opinion the general rule that:

> ". . . *any state action that substantially restricts the right to candidacy* must be given strict scrutiny and meet the test that the restriction is justified by a compelling state interest." 395 F. Supp. at 8. (Emphasis supplied.)

Judge Swygert cited *Mancuso* v. *Taft,* 476 F. 2d 187 (1st Cir., 1973), for that proposition, and concurred in Judge Decker's opinion in *Blassman* upholding the minimum age restriction only because until adoption of the Twenty-Sixth Amendment, the minimum age of 21 for voting could not, by reason of the Fourteenth Amendment, be exceeded by the states.[9]

> ". . . *so long as a State does not set the voting age higher than 21,* the reasonableness of its choice [at or below that age] is confirmed by the . . . Fourteenth Amendment. . . ." (Emphasis added.)

In that context, Judge Swygert's citation of *Mancuso* v. *Taft, supra,* is instructive. In *Mancuso,* a city police officer attacked part of a city home rule charter that barred him from continuing in his employment if he ran for public office. Viewing the charter as an effective limit on both candidate and voter rights, the First Circuit struck the law, holding:

> ". . . that candidacy is both a protected First Amendment right and a fundamental interest. *Hence any legislative classification that significantly burdens that*

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[9]Judge Decker in *Blassman,* 359 F. Supp. at 6 relied on the statement of Justice Stewart concurring in *Oregon* v. *Mitchell,* 400 U.S. 112 at 294-5, n. 14 (1970),

interest must be subjected to strict equal protection review." 476 F. 2d at 196 (Emphasis added.)

After discussing the First Amendment rights affected by curbs on candidacy, that Court found that because candidacy is both a First Amendment right and a fundamental interest, any legislative classification that burdens that interest must be subjected to the strict scrutiny test under Fourteenth Amendment equal protection standards:[10] Finding the flat prohibition against any candidacy to be overinclusive and not reasonably necessary, the Court struck it.

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[10] In *Mancuso, supra,* the Court stated:

"Standard of Scrutiny

"Appellee's complaint, simply put, is that Cranston has divided its citizenry into two groups for purposes of candidacy for public office: in one group, all classified civil servants, who are prohibited from filing as candidates; and, in the other, all other citizens, free to run for office, subject only to general age and similar requirements.

• • •

The Supreme Court has tended to use one of two standards for review when determining whether a particular state action violates the equal protection clause of the Fourteenth Amendment. *For state action concerning economic regulation* and taxation, the Court has employed a relaxed review, upholding the challenged action if it is sustained by some rational and legitimate state interest. • • • *For state action which substantially infringes fundamental interests, however, the Court has subjected the state action to stricter scrutiny,* requiring the state to show that its action is necessary to promote a compelling state interest.

In evaluating candidacy restrictions there are two interlocking interests, both fundamental, that must be

Since *Mancuso, supra,* the Fifth Circuit also applied the strict scrutiny test to a state law burdening candidate and voter rights by imposing a three-year residency requirement "as a qualified voter" on candidates for school boards. *Henderson* v. *Fort Worth School District,* 526 F. 2d 286 (5th Cir. 1976). Since three years of residency required also that candidates be "qualified voters"

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[10] (Continued)

considered. We naturally consider the rights asserted by the plaintiff in claiming the opportunity to become a candidate for public office. But whenever a state or city regulates the right to become a candidate for public office, it also regulates the citizen's right to vote; the person or persons whose candidacy is affected may be the voters' choice for public official.

• • •

A. Voting Rights

In *Bullock,* the Chief Justice stated that not every candidate restriction affects the right to vote sufficiently to require a strict equal protection review of the restriction. The task of the federal courts is to 'examine in a realistic light the extent and nature of their impact on voters.' 405 U.S. at 143, 92 S. Ct. at 856. • • •

We note initially that while in *Bullock* the filing fees were so large that they indirectly limited the pool of candidates, *here the pool is directly and substantially limited by a prohibition on the candidacies of a specific class of people*—the public employees of Cranston. • • •

Secondly, the Cranston charter *excludes a specific group with unique qualifications for public office.* City employees have made government their daily work. They see the work of government within their department and as their department deals with the public and other parts of government, local, county, state, and national. They ought to be able to pinpoint problems and formulate solutions much more effec-

during that period, the Court viewed the restriction as imposing a minimum age (at least three years older than the voting age) as well as a residency requirement. 526 F. 2d at 289. The barrier of three year residency and age restrictions before the Court in *Henderson* was seen to be of such impact as to warrant strict construction:

> "*It is absolute in its operation. No exception is made for expertise,* familiarity, or the extent of political support. . . ." 526 F. 2d at 291-2.
>
> • • •
>
> ". . . denies access to what must be assumed is a *significant number of potential school board candiduties, and on that basis the statute's impact on voters is substantial.*" 526 F. 2d at 292 (Emphasis added.)

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[10] (Continued)

tively than many other citizens. *The experience and insight garnered from day-to-day grappling with the bureaucracy could well make these individuals particularly attractive to the voters. For these reasons, then, we find that the fundamental interest of the right to vote is significantly affected by* §14.09(c) of the Cranston charter *and that therefore strict equal protection review must be applied.*

B. First Amendment Rights

We now inquire whether the interest of the individual in running for public office is an interest protected by the First Amendment, so that any law which significantly infringes that interest must be given strict review. The Supreme Court has never directly decided this point. However, Williams v. Rhodes, supra, strongly suggests that the activity of seeking public office is among those protected by the First Amendment. • • •

The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association. • • • 476 F. 2d at 192-95. (Emphasis added.) (Footnotes omitted.)

In language directly applicable herein, the court in *Henderson, supra,* rejected the asserted purpose of the statute:

> "The argued justification for section 7 is the state's interest in a ballot composed of knowledgeable and qualified candidates for the increasingly complex job of school board member. However, voter registration for a period of three years *is, at best, a crude index of the capabilities of a potential candidate. The background, experience, and political views of the potential candidate are, among others, the indicia of merit and capability. No one contends, or could, that the state is empowered to impose qualifications or requirements in these areas.* On the contrary, the power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy *rests with the voters* of the Fort Worth School District. *It can be assumed that opposing candidates will bring deficiencies in any of these areas to the attention of the voters.*" 526 F. 2d at 292. (Emphasis added.)

Here as well the legislative interest asserted by defendants at trial—that of promoting a "more vigorous judiciary" through mandatory retirement by age limit — imposes what is "at best, a crude index of the capabilities of a potential candidate." Here, too, the deficiencies in vigor of any judge — should one slip by the heretofore completely effective devices employed in Illinois for early retirement of non-vigorous judges[11] — can be brought to the attention of the voters. Here, as in *Henderson, supra,*

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[11] On the record below, it was uncontradicted that informal efforts of Court administrators in Illinois, backed by enforcement machinery, brought voluntary retirement of all non-vigorous judges, leaving only vigorous judges to be retired by reason of age.

the Retirement Act "is absolute in its operation", and "no exception is made for expertise" or, for that matter, judicial vigor. Thus strict scrutiny is likewise applicable herein, and for the same reason the Retirement Act cannot survive that scrutiny.

Arguments and briefs to the District Court and Seventh Circuit below asserted under the Fourteenth Amendment both the strict scrutiny test based on denied ballot access and voter rights, and alternatively, the rational relationship test based on precedent in cases dealing with age retirement of non-elected persons. The District Court blow dealt only with the rational relationship test. The Findings reflect no examination of "the extent and nature of [the] impact on voters" of the restriction at issue here, as required by *Bullock* v. *Carter*, 405 U.S. 134 (1972). The District Court's Conclusions of Law similarly fail to address that issue. They state only:

> "17. The rights of the class of plaintiff voters do not exceed the rights of the class of plaintiff judges. Since the class of plaintiff judges are lawfully subject to the terms of the Act, no rights of the class of plaintiff voters are impaired."

Nor did the Court of Appeals carry out the analysis required by *Bullock*. The Court of Appeals sought to limit strict scrutiny to ballot restrictions applicable "to exclude candidates of an identifiable group [limited to economic status] or viewpoint." 594 F.2d at 632 (insert supplied). That view conflicts with the premise of democracy —that for all elective offices, the voters decide who is qualified, or "vigorous" for that matter, except in limited areas strictly reviewed.

Political preferences and viewpoints are not limited to political parties but are also expressed through support

of candidates and identification with voter constituencies based on a wide variety of factors including their stand on issues, occupation, personal background and age. A reality ignored by the court below is that older voters represent an important and growing political constituency. The principle of *Socialist Workers Party* and similar cases is not confined to political preferences of candidates and voters of a particular political party.The Court of Appeals decision would permit a Legislature to cut off a 60 or 65 year old Governor or other official from reelection, or impose some other maximum age based on "any state of facts" that may be argued, so as to open those offices for other persons, subject only to the "rational relation" test. Surely the right to run for office and the right to vote for candidates does not rest on such a weak Constitutional base.

II.

THE ILLINOIS COMPULSORY RETIREMENT OF JUDGES ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE OF THE CLASSIFICATIONS CONTAINED IN SECTION 2 OF THE ACT.

As previously shown, Section 2 of the 1965 Act deferred for up to eighteen years the retirement of many judges sitting when the law was passed in 1965, and by 1973 amendment permitted some judges to sit beyond age 70 until obtaining pension benefits. The record shows that Section 2 was added after the law failed of adoption in 1963, and there was need to broaden protection to sitting judges so as to obtain necessary support in the Legislature. Thus, sitting judges were protected in their rights to sit long enough to earn maximum retirement benefits. The net result was to protect some judges in their right

to serve into their late 70's and 80's, many of whom still continue to serve. Those judges have the same duties as those in the Judge Petitioner Class, and each judge in both groups must of course stand for election and re-election at the end of each term. Thus, judges similarly situated are treated differently by the Act, depending on when they took office. It has nowhere been suggested that the date of the protected judges taking office prior to 1965 has any relation to the vigor or other capacity of judges at age 70. Nor was any explanation offered for the 1973 special savings clause, except the testimony that it was enacted to protect one or more judges deemed loyal party workers — again, a purpose unrelated to any purpose asserted or contemplated by the lower courts for mandatory retirement.

Thus, part of the affected class of judges was protected for reasons having no relation to any purpose suggested for retirement based on age. Indeed, if retirement based on age is found to be rationally related to a proper purpose, then holding some judges in office past that age is directly contrary to any such purpose.

For reasons set forth in Part I of this Petition, this distinction between judges disqualified from elective office and those "grandfathered" into office cannot stand strict scrutiny under the Fourteenth Amendment.

Moreover, authority supporting "grandfather clauses" which discriminate in favor of members of class is not applicable here because such authority (1) is limited to economic regulation, not access to elected public office, (2) requires the exception to be related to the purpose of the law itself, not some other purpose, and (3) Illinois judges reenter the class anew each time they run for reelection or retention.

The Court of Appeal's rejected the challenge to the Act based on reading §2 thereof in conjunction with §1. It first cited *Vance* v. *Bradley,* ..... U.S. ....., 41 U.S.L.W. 4176 at 4181 (Feb. 22, 1979) as authority that §2 "may be rationally related to a different legitimate state interest [than that asserted or considered for §1], and constitutional for that reason." 594 F.2d at 630 (insert supplied.) But while *Vance* at the portion cited may be read to permit a court to consider any possible rationale to justify a statute not governed by strict scrutiny, that case did not deal with distinctions within an affected class. The law in *Vance* affected all foreign service officers.

The Court of Appeals reasoned that the §2 distinction between judges was justified because it enabled judges elected prior to the enactment of mandatory retirement to obtain judicial pensions. The Court reasoned that those judges had relied on the absence of mandatory retirement at the time of their election, and therefore the Legislature could give them special protection to enable them to obtain their pensions. 594 F.2d at 630-1, [redacted]

To the contrary, it is clear from the record that the judges in office in 1965 were judges who were elected or appointed between 1962 and 1965, at a time when the former Illinois Constitution permitted the enactment of judicial mandatory retirement. Thus, such judges cannot be said to have relied on the absence of mandatory retirement. And the 1973 sitting judges who were specially protected clearly had no such reliance interest.

Moreover, the law does not support the classification here. To be constitutionally valid the classification must be rationally related to some purpose of the Act itself. No such showing was made or found below.

In *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), this Court considered an ordinance prohibiting street vendors in the City's "French Quarter." The ordinance exempted from its provisions vendors who had continually operated their businesses in the French Quarter for a period of at least eight years prior to the effective date of the Act. Faced with plaintiff's equal protection challenge to the ordinance, the Court first recognized that the legislature may permissibly choose to implement its economic regulations "step-by-step," but then considered whether the exemption created by the grandfather clause rationally furthered the City's purpose in passing the new law. 427 U.S. at 303. The Court found that the purpose of the ordinance was to preserve the charm and beauty of the French Quarter, and noted that the vendors exempted from the statute's prohibition "had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre." *Id.* at 305. Based upon this recognition, the Court found that the

> "city's classification *rationally furthers the purpose which . . . the city had identified as its objective in enacting the provision,* that is, as a means 'to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.'" 427 U.S. at 304.

In other cases in which a clause excepting certain individuals from a licensing statute has been expressly discussed, the classification so established rationally furthered the state's interest, as evidenced by the overall statutory scheme. See, *e.g.*, *Watson* v. *Maryland*, 218 U.S. 173, 176-77 (1910):

> "In such statutes there are often found exceptions in favor of those who have practiced their

> calling for a period of years. In the *Dent* case [*Dent* v. *West Virginia*, 129 U.S. 114 (1889)] an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. *Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts.*" (Emphasis added.)

In these and similar cases involving "grandfather clauses," the legislation being challenged was enacted pursuant to the State's authority in the area of economic regulation, an area in which wide legislative discretion is permitted. Indeed, the Court in *New Orleans* v. *Dukes*, *supra*, repeatedly emphasized the purely economic nature of the contested ordinance considered therein, and permitted the challenged clause to stand only under the minimal analysis accorded legislation in that area. 426 U.S. at 303-6.

Moreover, these cases upheld true "grandfather clauses": clauses which gave special protections to persons in the class at the time the law was enacted. None of those cases permitted special protection to extend to some persons who enter the class later, while discriminating against others who newly enter it. Here, in contrast, the special protections continued for judges who *re-entered* the class each time they were re-elected by retention election every six years. That is, judges on the bench in 1965 only held certificates of election or retention for the duration of their terms. At the expiration of their terms, they had to be re-elected. A true "grand-

father clause" in the sense of curing an economic problem, if applied here, would have protected the 1965 sitting judges only until the end of their terms. But when they re-entered the class (*i.e.*, the judiciary), through re-election, they should have had to serve under the same restrictions of all new entrants. Here, of course, that was not the case. To obtain legislative support to pass the mandatory retirement act at all, all judges then on the bench received blanket protections *that carried into their future terms of office.* Thus, while all judges were equal in terms of their judicial authority and work, as they were re-elected, some where "more equal" in terms of retirement. Indeed, the 1973 savings clause highlighted the original discrimination while creating a new special discrimination in favor of judges on the bench in that year.

The true "grandfather" cases, therefore, dealt not with a bald dispensation afforded to members of a privileged class merely on the basis of the date they took office, but with exceptions to a new statutory mandate, with the exceptions found to further the new statute's purpose. Obviously, if removal at age 70 insures judicial vigor or serves some other purpose, permitting judges to remain in office for years beyond age 70 does not. Thus, no constitutionally permitted justification exists for the distinctions within the class of judges. Consequently, they are irrational distinctions which violate the Equal Protection Clause and are unconstitutional.[12]

[12] The reliance of the Court below on *Williams* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955) and *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966) is likewise misplaced. In *Williams*, supra, *all* opticians were equally affected. They objected because sellers of ready-to-wear glasses were omitted from regulation. To this objection that a *different and additional* class should have been included

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[12] (Continued)
in the law the Court responded with language permitting "reform . . . one step at a time." In that case, there were no distinctions within the class affected by the law in issue.

In *Katzenbach*, supra, the franchise rights of voters was expanded by the Voting Rights Act of 1965. It was attacked in part on grounds that it extended voting rights to all those who attended Puerto Rico schools, assertedly discriminatory against those who attended schools elsewhere not affected by the law. To this, the Court pointed out that the law expanded the franchise for some people, and did not limit any rights to anyone. Since rights were not being denied or curtailed, once again "reform may take one step at a time . . . ." *Katzenbach*, supra, 384 U.S. at 657. In the case at bar, rights to hold public office are obviously being curtailed, and *Katzenbach* clearly does not apply.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1941

RAYMOND E. TRAFELET, et al.,

Plaintiffs-Appellants,

v.

JAMES R. THOMPSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1036—**Prentice H. Marshall**, *Judge.*

ARGUED DECEMBER 5, 1978—DECIDED MARCH 16, 1979

Before TONE, LAY,* and BAUER, *Circuit Judges.*

TONE, *Circuit Judge.* This action challenges the constitutionality of the Illinois Compulsory Retirement of Judges Act. Section 1 of that Act, Ill. Rev. Stat. ch. 37 §§ 23.71 (1977), provides in substance that a judge is automatically retired after the next general election

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[1] The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

following his 70th birthday.[1] Section 2, *id.* § 23.72, creates grandfather exceptions to § 1, which, so far as they are pertinent here, allow the excepted judges to remain in office until they have served long enough to secure certain pension rights.[2] After a trial, the district court held that the Act did not violate either the United States Constitution or the Illinois Constitution and entered judgment for the defendants. We affirm the judgment.

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[1] Section 1 provides as follows:

> A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

[2] Section 2 provides as follows:

> The provisions of Section 1 [23.71] of this Act are suspended, however, with respect to any judge in office on the effective date of this Act [July 20, 1965]. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70. The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code [Ill. Rev. Stat. ch. 108½, § 18-101, *et seq.*, (1977)], on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

The district court certified two classes of plaintiffs: (1) all judges of the Supreme, Appellate, and Circuit Courts of Illinois whom the Act will force into retirement before the expiration of their certified terms or preclude from running for retention in office;[3] and (2) all registered voters in Illinois who will be denied the opportunity to vote for the judicial candidates of their choice because the Act precludes those candidates from running for election to, or retention in, office. The defendants are the state officers responsible for executing the provisions of the challenged statute.

The plaintiff judges assert several challenges to the Act. Section 1 (§ 23.71) is attacked on two federal grounds:

> (1) It is said to violate the equal protection clause of the Fourteenth Amendment by creating distinctions between judges of the age of 70 and older and judges younger than 70, and between judges and all other elected officials, who are not subject to mandatory retirement provisions. These distinctions, it is argued, are not rationally related to the stated purpose of the Act.
>
> (2) It is said to violate the due process clause of the Fourteenth Amendment by creating an irrebuttable presumption.

Section 2 of the Act (§ 23.72) is attacked on one federal and one state ground:

> (1) It is said to violate equal protection by allowing certain judges to remain in office beyond the

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[3] In Illinois, elected judges who seek another term in office run unopposed on a non-partisan "retention ballot" and must get the affirmative vote of three-fifths of the electors voting on the question. Ill. Const. art. VI, § 6(d) provides in pertinent part as follows:

> . . . The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. . . . The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office . . . .

age of 70 on the basis of criteria unrelated to the purpose of the Act.

(2) It is said to violate Article VI, § 15(a) of the Illinois Constitution[4] by failing to prescribe a single age at which judges must retire.

The plaintiff voters assert that the Act violates their rights under the equal protection clause by discriminatorily denying them the opportunity to vote for candidates of their choice.

The Judges' Claims

1. *Equal Protection Challenges to § 1 of the Act.*

The applicable standard is whether the challenged classification is rationally related to a proper legislative purpose. Neither the right of governmental employment, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), nor the right to run for elective office, *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972), is fundamental. *See* J. Nowak, R. Rotunda, and J. N. Young, *Handbook on Constitutional Law* 686 and 643 (1978) and L. Tribe, *American Constitutional Law*, § 13-19 at 775-777 (1978). Judicial office is no exception. *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied*, 409 U.S. 1037 (1973). Furthermore, age is not a suspect classification for equal protection purposes. *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 313-314. Accordingly, like the plaintiffs in *Vance v. Bradley*, ... U.S. ....., 47 U.S.L.W. 4176, 4177 (Feb. 22, 1979), in which the Supreme Court sustained a statute providing for mandatory retirement of Foreign Service officers at age 60, the plaintiff judges here concede that the rational relationship standard is applicable and contend only that the court failed to apply the correct standard properly.

The judges do argue, however, that we may properly consider only those legislative purposes articulated by

[4] Ill. Const. art. VI, § 15(a) reads in relevant part:

> The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age.

the state at the time the statute was enacted. Whatever doubt on this point may have been engendered by language in some of the cases in recent years[5] seems to have been resolved by the Supreme Court's recent opinion in *Vance v. Bradley, supra*. There the Court, referring to the rational relationship standard, said,

> In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

47 U.S.L.W. at 4181. In support of that statement the Court cited several cases stating the standard of whether any state of facts may reasonably be conceived to justify the classification[6] and described *McGinnes v. Royster*, 410 U.S. 263, 274 (1973), with apparent approval as "finding that the legislature 'could have concluded rationally that' certain facts were true." We conclude that we are not limited to the legislative purpose articulated by the state at the time of enactment, although even if we were we would sustain the statute.

A review of the history of the Act reveals its purpose. In creating the Judicial Advisory Council of Illinois in 1957 the Illinois General Assembly provided,

> The Council shall, by continuous study of the problems involved, devise means to effect the improvement of the administration of justice in and

[5] *See White v. Fleming*, 522 F.2d 730, 736 n.8 (7th Cir. 1975). Plaintiffs rely particularly on the statement in *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 314, that ". . . the State's classification rationally furthers the purpose identified by the State," which is not the same as saying no other purpose would have been considered.

[6] In the first case cited, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), the Court said,

> [I]f any state of facts reasonably can be conceived that would sustain [the changed statute], the existence of that state of facts at the time the law was enacted must be assumed.

> with relation to the State, and to formulate all suggestions and recommendations concerning legislation and other measures designed to bring about such improvement.

Ill. Rev. Stat. ch. 37, § 605 (1957). In pursuit of this goal, the Council recommended the legislation on mandatory retirement that became the Act before us. When that legislation was introduced in the legislature in 1963, the Council announced the specific purpose of § 1 as follows:

> It is the consensus of the Council that a mandatory retirement at age 70 will tend to insure a more vigorous judiciary to which the public is entitled.

Report of the Judicial Advisory Council of Illinois 9-10 (June 1963) (Submitted to the Governor and the Seventy-Third General Assembly of the State of Illinois). Thus it is fair to infer that the purpose of the Act was to further this articulated purpose of insuring a more vigorous judiciary.

Plaintiffs contend that the classification created in § 1 of the Act is not rationally related to that purpose. First, they argue that the state has no rational basis for mandatorily retiring judges but no other elected state officials. Second, they argue that there is no rational basis for treating judges differently when they reach age 70, and that the Illinois laws for removing judges under age 70 from office should serve as well for judges 70 and over.[7]

The legislature could rationally have justified treating judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode. Although the defenders of the statute were not required to establish by evidence a rationality that is obvious from the common experience of mankind, *see Vance v. Bradley, supra*, 47 U.S.L.W. at 4181 & n.28, they nevertheless did so. The district court found that published scientific data, some predating the enactment of the Act in 1965, show an association between aging,

[7] *See* Ill. Const. art. VI, §§ 15(b)-(g), described in note 8, *infra*.

specifically during the sixth and seventh decades of life, and a decline in intellectual function and personality factors. It is irrelevant that evidence was adduced to rebut this data:

> It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916), quoted in *Vance v. Bradley, supra*, 47 U.S.L.W. at 4181.

The equal protection clause does not prohibit the legislature from adopting a more rigorous policy for assuring excellence in the judiciary than for other elective offices. As the Supreme Court said of the Foreign Service in *Vance v. Bradley, supra*, 47 U.S.L.W. at 4179,

> The judgment that the Foreign Service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be "fixed only by the people acting through their elected representatives."

Citing *Fireman v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129, 138 (1968).

If more were needed, it would also be relevant that judges are the only public officeholders in Illinois who, once elected, are not opposed by another candidate when they seek reelection but rather "run against their records." See note 3, *supra*. Because of this retention system, it is much more difficult to dislodge a judge than an official who must run against another candidate. Mandatory retirement for judges is rationally related to the difference in the retention rights of judges and other elected officials.

Many judges compelled to retire at 70 will still be highly competent. When, however, a statutory requirement of retirement at a given age is tested by the

rational relationship standard, the line drawn by the legislature will be accepted where "[t]here is no indication that [the statute] has the effect of excluding from service so few . . . who are in fact unqualified as to render age . . . a criterion wholly unrelated to the objective of the statute." *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 315-316. *See also Vance v. Bradley, supra*, 47 U.S.L.W. at 4180-4181 (the classification was not made invalid by "the fact that individual Foreign Service employees may be able to perform past age 60"); *Weinberger v. Salfi*, 422 U.S. 749, 776-777 (1975); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Perfection is not required and whether "we . . . think [the legislature] was unwise in not choosing a means more precisely related to its primary purpose is irrelevant." *Vance v. Bradley, supra*, 47 U.S.L.W. at 4181.

It follows that the existence of other means for evaluating a judge's performance, on which plaintiffs rely, does not render mandatory retirement at age 70 unconstitutional. In *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 316, the Court stated:

> That the State chooses not to determine fitness more precisely through individualized testing . . . is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation.

If it were necessary to go further, it could readily be demonstrated that here, more than in *Murgia*, there are good reasons to consider individualized evaluations an inadequate substitute for a maximum age limitation. Fitness to be a policeman is more susceptible of objective evaluation than fitness to be a judge, because decline in the intellectual ability and the personality factors essential for effective judicial performance are more difficult to measure than decline in physical condition. The Illinois evaluation means to which plaintiffs refer involve an investigation, a complaint,

and an adjudicative hearing.[8] As a practical matter, this cumbersome individualized removal procedure, attended as it is with stigma to the judge, is unlikely to be used except in the most extreme cases. Informal pressures to retire are scarcely more effective. Usually the reluctance of judges to ask a colleague to step down is exceeded only by his reluctance to do so.[9] It was entirely

[8] The evaluation process, set forth in Ill. Const. art. VI, §§ 15(b)-(g), requires prosecution by a Judicial Inquiry Board in a public hearing before the Courts Commission, which has authority to order, *inter alia*, mandatory retirement of the judge. "A Judicial Inquiry Board is created . . . with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Court Commission . . . . The Board shall prosecute the complaint[s]." The Courts Commission, which consists of one Supreme Court Judge, two Appellate Court Judges, and two Circuit Court Judges, has "authority after notice and public hearing, . . . (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties."

[9] *See* C. Hughes, *The Supreme Court of the United States* 75-76 (1928):

> Justice Field tarried too long on the bench. It is extraordinary how reluctant aged judges are to retire and to give up their accustomed work. They seem to be tenacious of the appearance of adequacy. I heard Justice Harlan tell of the anxiety which the Court had felt because of the condition of Justice Field. It occurred to the other members of the Court that Justice Field had served on a committee which waited upon Justice Grier to suggest his retirement, and it was thought that recalling that to his memory might aid him to decide to retire. Justice Harlan was deputed to make the suggestion. He went over to Justice Field, who was sitting alone on a settee in the robing room apparently oblivious of his surroundings, and after arousing him gradually approached the question, asking if he did not recall how anxious the Court had become with respect to Justice Grier's condition and the feeling of the other Justices that in his own interest and in that of the Court he should give up his work. Justice Harlan asked if Justice Field did not remember what had been said to Justice Grier on that occasion. The old man listened, gradually became alert and finally, with his eye blazing with the old fire of youth, he burst out:

(Footnote continued on following page)

rational for the legislature to believe that the most satisfactory way to insure a vigorous judiciary was to impose a maximum age limitation.

It should be noted also that at least one public purpose in addition to insuring a vigorous judiciary is served by the Act. It can hardly be questioned that the risk of death and disabling illness increases with age. Mandatory retirement thus reduces delays in the administration of justice caused by death or disabling illness of sitting judges.

Our conclusion that mandatory retirement for judges at age 70 does not violate the equal protection clause is supported by the case law involving mandatory retirement of various kinds of governmental officers and employees. *Vance v. Bradley*, *supra*, 47 U.S.L.W. 4176; *Massachusetts Board of Retirement v. Murgia*, *supra*, 427 U.S. 307; *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975); *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978); *Johnson v. Lefkowitz*, 566 F.2d 866 (2d Cir. 1977); *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd summarily*, 420 U.S. 940 (1975); *McIlvaine v. Pennsylvania State Police*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed for want of substantial federal question*, 415 U.S. 986 (1974).

2. *Due Process Challenge to § 1 of the Act.*

Plaintiffs argue that § 1 violates the due process clause by creating an irrebuttable presumption that judges become unfit to hold office at age 70.

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[9] *continued*

"Yes! And a dirtier day's work I never did in my life!"

That was the end of that effort of the brethren of the Court to induce Justice Field's retirement; he did resign not long after.

This anecdote is also recounted in J. Frankel, "Removal of Judges" 48 *Judicature* 177, 178 n. 11 (1965); R. Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 250 (1972); D. Jackson, *Judges* 275 (1974).

In *Miller v. Carter*, 547 F.2d 1314, 1316-1319 (7th Cir. 1977), *aff'd by an equally divided court*, 434 U.S. 356 (1978), we expressed our uncertainty concerning the scope and continuing force of the doctrine of irrebuttable presumptions, and noted the Supreme Court's failure to refer to the doctrine in *Massachusetts Board of Retirement v. Murgia*, *supra*, which we thought "particularly striking in light of Mr. Justice Rehnquist's dissent in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 659 (1974), adverting specifically to the effect of the irrebuttable presumption doctrine on mandatory retirement statutes." 547 F.2d at 1318 & n.16. Since our decision in *Miller*, the Supreme Court has not relied upon the doctrine in any case, although the Court has had several opportunities to do so. *Vance v. Bradley*, *supra*, is the second mandatory retirement decision in which the Supreme Court has not referred to the irrebuttable presumption doctrine; even Justice Marshall, the lone dissenter, although specifically pointing out that the district court judgment invalidating the statute which the Court was reviewing could be sustained on any ground finding support in the record, did not mention the irrebuttable presumption doctrine. *See also Friedman v. Rogers*, ... U.S. ....., 47 U.S.L.W. 4151, 4153 n.8 (Feb. 21, 1979); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976). *Cf. Elkins v. Moreno*, 435 U.S. 647 (1978). *See deLaurier v. San Diego Unified School District*, No. 75-2096, slip op. at 3536-3537 n.16 (9th Cir. Nov. 2, 1978).

A survey of Court of Appeals opinions written after *Miller* reveals that we have not been the only court "unwilling to plunge unnecessarily into the thicket of irrebuttable presumptions . . . ." 547 F.2d at 1317. Among these opinions we find only one that relied solely on the irrebuttable presumption doctrine to strike down a statute: *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977), held that the Philadelphia School District's policy prohibiting blind teachers from teaching students who were not blind violated due process by creating an

irrebuttable presumption of unfitness. The School District refused to give blind teachers the Philadelphia Teachers Examination, thus depriving them of the opportunity, given to sighted teachers, to prove their competency. The court found it unnecessary to evaluate the equal protection arguments because it affirmed the trial court's due process holding, 556 F.2d at 188, *aff'g Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); therefore we do not know how the Third Circuit views the relationship between the doctrine and equal protection law.

Other courts have uniformly treated the doctrine of irrebuttable presumptions as coextensive with the equal protection clause. *E.g., deLaurier v. San Diego Unified School District, supra*, slip op. at 3535-3538 & n.16; *Fairfax Hospital Assoc. v. Califano*, No. 77-1552, slip op. at 15-20 (4th Cir. Sept. 19, 1978), *Martin v. Harrah Independent School District*, 579 F.2d 1192, 1197-1199 (10th Cir. 1978); *West v. Brown*, 558 F.2d 757, 760 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). In a series of decisions, most of which involve mandatory retirement statutes, the Second Circuit has concluded that where "the statutory classification is sustainable as rationally based, then it should not fall because it might also be labelled a presumption." *Palmer v. Ticcione, supra*, 576 F.2d at 463 (mandatory retirement for teachers at age 70); *Sakol v. Commissioner*, 574 F.2d 694, 696-698 (2d Cir.), *cert. denied*, ... U.S. ..... , 99 S.Ct. 177 (1978); *Johnson v. Lefkowitz, supra*, 566 F.2d at 869 (mandatory retirement for civil service employees at age 70); *Rubino v. Ghezzi, supra*, 512 F.2d at 433 n.* (mandatory retirement for state court judges at age 70). These cases are consistent with the conclusion reached by Professors Nowak, Rotunda, and Young, in their *Handbook on Constitutional Law, supra* at 497, from an examination of Supreme Court cases applying the doctrine:[10]

[10] *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Turner v. Department of Employment*, 423 U.S. 44 (1975); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973).

> It now seems readily apparent that these cases actually rest on an equal protection rationale, for the objectionable portion of each law was the way in which it classified individuals. It was arbitrary classification . . . that was the impermissible basis of these laws. In none of the cases would a "process" have saved the law because the procedure would only have determined whether an individual fitted into one of these arbitrary classifications.

(Footnotes omitted.)

Having concluded that the classification adopted by the legislature is not suspect, does not impair fundamental rights, and is rationally related to a legitimate state purpose, and therefore satisfies the requirements of equal protection, we cannot find it unconstitutional as creating an irrebuttable presumption.

3. *Equal Protection Challenge to § 2 of the Act.*

Plaintiffs argue that, in exempting certain judges from the requirement of retirement at age 70, § 2 violates equal protection because it does not further the purpose of § 1, which is insuring a vigorous judiciary. The weakness of the plaintiffs' position is their failure to acknowledge that § 2 may be rationally related to a different legitimate state interest, and constitutional for that reason. *Cf. Vance v. Bradley, supra*, 47 U.S.L.W. at 4181; *Palmer v. Ticcione, supra*, 576 F.2d at 462-463.

Provision of retirement benefits for former public servants is a legitimate state interest; we doubt that plaintiffs would contend otherwise. Section 2 allows two classes of judges to remain in office long enough to secure pension rights under Ill. Rev. Stat. ch. 108½ § 18-124. See note 2, *supra*. The first consists of judges in office on the effective date of the Act, who are allowed to remain in office long enough to secure maximum pension rights. This is a fair and rational treatment for those who became judges before retirement at 70 was mandatory.[11] The second consists of those judges in of-

[11] We are unpersuaded by plaintiffs' argument that upon continuation in office after a retention election, these judges should have been placed in the same class with other judges

(Footnote continued on following page)

fice on June 30, 1973, who would not qualify for minimum pension rights if retired at age 70; they are allowed to complete the balance of their current terms when by doing so they will qualify for pension rights. However dubious we may be about the rationality of distinguishing between judges in office on that date and those who took office thereafter, when the significance of the date is not explained by anything before us, we cannot hold the Act invalid on this basis. Only judges disadvantaged by the classification would have standing to complain of it. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499-502 (1975), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-227 (1974). Neither any of the named plaintiff judges nor any member of the class they represent complains that he was not allowed to serve until he qualified for a minimum pension while others similarly situated were given that privilege.

Section 2 is a temporary provision that slows the implementation of § 1 to alleviate hardships to individuals. As the Supreme Court has frequently held, when suspect classifications or fundamental rights are not involved, legislatures may implement programs gradually, or step by step, enacting laws "that only partially ameliorate a perceived evil . . . deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-305 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

4. *Challenge to § 2 of the Act under Illinois Constitution.*

Plaintiffs argue that the Act fails to provide "a prescribed age" for retirement as required by Ill. Const. art. VI, § 15(a), because § 2 exempts some judges from the Act. This contention is without merit. The Act does provide a prescribed age for retirement in § 1. Section 2's suspension of § 1 as to certain judges specially situated with regard to the pension laws does not, in our

[11] *continued*
who accepted the office with knowledge of retirement laws. The reliance interest of the exempted judges was a sufficient reason for the classification.

opinion, render the Act inconsistent with the Illinois Constitution, the framers of which were aware of § 2. *See* Constitutional Commentary to Ill. Const. art. VI, § 15(a), Ill. Stat. Ann. at 522-523 (Smith-Hurd). Consequently, we conclude that the Act does not violate the Illinois Constitution.

We affirm the district court's holding that the Act does not violate the plaintiff judges' constitutional rights.

The Voters' Rights

Plaintiff voters argue that the Act violates their rights under the equal protection clause by denying them the opportunity to vote for candidates of their choice. They cite *Bullock v. Carter, supra*, 405 U.S. at 134, for the proposition that the state must demonstrate a compelling interest to justify restrictions which have an impact on voters. We do not read the case so broadly.

In *Bullock* the Court began its analysis of the Texas filing fee requirement by observing that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Id.* at 143. The filing-fee requirement created a "disparity in voting power based on wealth," *id.* at 144, because it had the effect of denying ballot access to disproportionately more candidates favored by the less affluent members of the community. Because the requirement "falls with unequal weight on voters, as well as candidates, according to their economic status," *id.* at 144, the Court applied the strict scrutiny standard of review.

No similar or analogous effect, *i.e.*, unequal treatment of candidates or voters identifiable by their economic status or political preferences, occurs here. Any limitation on voting rights is incidental to a classification not aimed at voters or elections. The rational relationship standard is therefore applicable to the claims of the plaintiff voters as well as those of the plaintiff judges.

Illinois State Board of Elections v. Socialist Workers Party, ... U.S. ....., 47 U.S.L.W. 4197 (Feb. 22, 1979), is not inconsistent with our conclusion. Although language in that case, 47 U.S.L.W. at 4200, could be read as subjecting any classification that limits voters' choices, in whatever manner or however incidentally, to a strict scrutiny standard, we interpret that language as referring to the situation before the Court in that case and not as withdrawing *sub silentio* the statement in *Bullock* that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143. It was consistent with that statement to apply the strict scrutiny standard to a classification that "impairs the voters' ability to express their political preferences." 47 U.S.L.W. at 4200. In both *Bullock* and *Illinois State Board of Elections*, the classification burdened identifiable groups of candidates or voters, identifiable in one case by their economic status and in the other by their political preferences.

Our interpretation of *Bullock* finds support in the decisions of other courts and in the writing of commentators. *Plante v. Gonzales*, 575 F.2d 1119 (5th Cir. 1978), involved a constitutional challenge to Florida's "Sunshine Laws," which require public disclosure of candidates' personal financial information, and which, the court noted, had the effect of precluding persons from running for office. After analyzing *Bullock*, Judge Wisdom, writing for the court, applied the rational relationship test because the Florida restrictions "do not limit the choices of any particular group of voters." 575 F.2d at 1127.[12] In another case the same court concluded that strict scrutiny applies only when "the effect of the restriction was to exclude candidates of an identifiable group or viewpoint." *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 301-302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). The Second Circuit rejected the contention under consideration when it held

[12] The court notes that lower courts and commentators have agreed that age requirements for officeholding "need bear only a rational relationship to state interests." 575 F.2d at 1126 n.10.

that no substantial federal question was presented in *Rubino v. Ghezzi*, *supra*, 512 F.2d 431. *Accord*, *Manson v. Edwards*, 482 F.2d 1076, 1077-1078 (6th Cir. 1973), and *Blessman v. Markworth*, 359 F.Supp. 1, 7 (N.D. Ill. 1973) (three judge panel). *See Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1218 (1975); L. Tribe, *American Constitutional Law*, *supra*, § 13-19 at 775-777.

We therefore affirm the district court's holding that the Act does not infringe the rights of the plaintiff voters.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 24, 1979

Hon. PHILIP W. TONE, Circuit Judge
Hon. DONALD P. LAY, Circuit Judge*
Hon. WILLIAM J. BAUER, Circuit Judge

RAYMOND E. TRAFELET, et al.,
Plaintiffs-Appellants,

No. 78-1941 *vs.*

JAMES R. THOMPSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 78-C-1036
PRENTICE H. MARSHALL, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

78-1917

No.

Supreme Court, U. S.
FILED
JUN 25 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinion by Judge Tone

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 16, 1979.

Before

Hon. PHILIP W. TONE, *Circuit Judge*

Hon. DONALD P. LAY, *Circuit Judge**

Hon. WILLIAM J. BAUER, *Circuit Judge*

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellants,

vs.

No. 78-1941

JAMES R. THOMPSON, as Governor of Illinois, et al.,

Defendants-Appellees, and

ALLEN HARTMAN, et al,

Intervening Defendants-Appellees.

---

* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1036

PRENTICE H. MARSHALL, *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND E. TRAFELET, et al.,

Plaintiffs,

v.

JAMES R. THOMPSON, et al.,

Defendants.

No. 78 C 1036

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

INTRODUCTION

In this civil rights action brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (3), two classes of plaintiffs, one represented by four judges of the Circuit Court of Cook County, Illinois, and another represented by three Illinois voters resident and registered in Cook County, Illinois, challenge the constitutional validity of an Act of the Illinois General Assembly, entitled "An Act relating to the compulsory retire-

ment of judges" (sometimes hereinafter "the Act"), which mandates the retirement of Illinois judges at age 70. Plaintiffs' principal contention is that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Act provides:

> "§ 1. A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.
>
> "§ 2. The Provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70. The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> "Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matter." Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977).

On May 22, 1978, we determined that the action be maintened as a class action pursuant to Rule 23(b) (2), both as to a class represented by the plaintiff judges, and as to a class represented by the plaintiff voters.

The judge plaintiffs have been certified to represent and to bring this action on behalf of a class composed of all judges of the Supreme, Appellate and Circuit Courts of Illinois who are or will be subject to mandatory retirement under Illinois law at age 70 before the end of their certified terms of office or who will be deprived of the right to run for retention of their office because they have attained or will attain the age of 70.

The voter plaintiffs Fitzpatrick, Wlliams and Lewis have been certified to represent and to bring this action on behalf of a class composed of all registered voters of the State of Illinois who are or will be denied the opportunity to vote for the judicial candidates of their choice because the judicial candidates of their choice are or will be subject to mandatory retirement under Illinois law at age 70.

The class of judge plaintiffs contend that the Act violates the equal protection clause of the Fourteenth Amendment on the following grounds:

1. There is no rational relation between age 70 and ability to discharge the duties of a judge.
2. There is no rational basis for the distinction between judges over 70, who are mandatorily retired, without a hearing as to their ability to serve, and judges under 70, who can be removed only after notice and hearing before the Illinois Courts Commission.
3. There is no rational basis for the distinction between judges, who are mandatorily retired at age 70, and other publicly-selected state officials, who are subject to no mandatory retirement age.
4. There is no rational basis for the various provisions of Section 2 of the Act which suspend the

provisions of Section 1 of the Act under the conditions, and with the effects, stated in Section 2 of the Act.

The class of voter plaintiffs contend that the Act violates their rights under the First and Fourteenth Amendments on the following grounds:

1. They are unlawfully denied the right to vote for judge candidates of their choice, insofar as they desire to vote for one or more of the members of the class of judge plaintiffs who are over age 70.
2. Their previous votes for members of the class of judge plaintiffs have been diluted insofar as members of the class of judge plaintiffs, who were previously voted for by members of the class of voters, are to be retired at age 70 prior to the expiration of the full term of the position for which members of the class of judge plaintiffs were last retained in office.

For the reasons hereinafter stated we hold that neither class of plaintiffs has shown any federal constitutional infirmity with respect to the Act.

The class of judge plaintiffs assert two additional claims which arise wholly under Illinois law, of which we have pendent jurisdiction.

The first pendent claim relates to Public Act 80-1057, enacted in 1977 by the Illinois General Assembly, which amended the Act by providing:

> "Any Supreme, Appellate or Circuit Judge who has been elected to that office and who seeks to be retained in that office under subsection (d) of Section 12 of Article VI of the Constitution shall file a declaration of candidacy to succeed himself in the office of the Secretary of State on or before the first Monday in December before the general election preceding the expiration of his term of office. The Secre-

tary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election." Ill. Rev. Stat., ch. 46, § 7A-1 (Supp. 1977).

Plaintiffs claim that Public Act 80-1057 violates Article VI, Section 12(d) of the Illinois Constitution, which provides in pertinent part:

> "Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself."

Plaintiffs' second pendent claim is that the Act violates the first sentence of Article VI, Section 15(a) of the Illinois Constitution, which provides: "The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age." Plaintiffs claim that the Act is unconstitutional under Illinois law, in that because of Section 2 and the 1977 Amendment it does not establish *a* single retirement age for Illinois judges but, rather establishes several ages.

For the reasons hereinafter stated we hold that these two contentions under Illinois law are without merit.

The action was brought on March 20, 1978. Plaintiffs promptly sought a preliminary injunction. At our suggestion the parties, through the commendable diligence

and cooperation of their counsel, readied themselves for trial on the merits which was held May 22-30. Guided by the recent decision of the Court of Appeals for this Circuit in *Gault* v. *Garrison,* 569 F.2d 993 and the Supreme Court's decision in *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, we decided the case orally on May 30, 1978. At that time we invited defendants to submit supplemental findings and conclusions, if they chose to do so, by June 7 which they did. We have now had the opportunity to consider defendants' proposed findings and conclusions and plaintiffs' objections in light of our decision of May 30, 1978. We now make our formal findings and conclusions pursuant to Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

1. Plaintiff David A. Canel is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. B; Tr. 49). Plaintiff Canel was born June 19, 1906. (Tr. 86). Plaintiff Canel was first elected a judge in 1959. (Tr. 49). Plaintiff Canel was most recently retained as a judge in the judicial retention election held in 1972. (Tr. 49). The term of the position for which plaintiff Canel was most recently retained expires on the first Monday in December, 1978. (Pl.Ex. B). Between 1959 and 1975, plaintiff Canel had not had a comprehensive physical examination. (Tr. 82). Plaintiff Canel's most recent comprehensive physical examination was in early 1976. (Tr. 81). Plaintiff Canel has never had a psychiatric or psychological examination. (Tr. 82).

2. Plaintiff Archibald J. Carey, Jr., is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. C; Tr. 103). Plaintiff Carey was born February 29, 1908. (Tr. 103). Plaintiff Carey was first elected a judge in 1966. (Tr. 103). Plaintiff Carey was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 103). The term of the position for which plaintiff Carey was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. C). Plaintiff Carey suffered a stroke on May 31, 1967, which caused him to be absent

from the bench until January 3, 1968. (Tr. 108). Plaintiff Carey has never had a comprehensive physical examination since 1976. (Tr. 118). Plaintiff Carey has never had a psychiatric or psychological examination. (Tr. 118).

3. Plaintiff Benjamin Nelson is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. F; Tr. 130). Plaintiff Nelson was born March 6, 1904. (Comp., ¶ 13(c)). Plaintiff Nelson was first elected a judge in 1960. (Tr. 130). Plaintiff Nelson was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 130). The term of the position for which plaintiff Nelson was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. F). Plaintiff Nelson most recently had a comprehensive physical examination in March of 1978. (Tr. 138). Prior to that time, the only comprehensive physical examination of plaintiff Nelson, since he has been a judge, was in 1970. (Tr. 138). Plaintiff Nelson has never had a psychiatric or psychological examination. (Tr. 139).

4. Plaintiff Raymond E. Trafelet is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. A; Tr. 144). Plaintiff Trafelet was born June 13, 1907. (Tr. 144-145). Plaintiff Trafelet was first elected a judge in 1968. (Tr. 144). Plaintiff Trafelet was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 145). The term of the position for which plaintiff Trafelet was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. A). Since he has been on the bench, plaintiff Trafelet has had physical examinations in 1969 and 1972. (Tr. 158-159). Plaintiff Trafelet has never had a psychiatric or psychological examination. (Tr. 159).

5. Each judge plaintiff is a vigorous, hardworking, productive judge.

6. Each judge plaintiff was aware of the provisions of Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977), when each last sought retention for the position each judge plaintiff now holds. (Tr. 68, 116, 137, 156).

7. Plaintiff Melvin B. Lewis, a duly registered voter, voted for plaintiff Raymond E. Trafelet for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention. He desires to vote for plaintiff Trafelet's retention in the future and for election and retention of some other judges in the class of plaintiff judges. (Comp., ¶ 14(a)).

8. Plaintiff Peter Fitzpatrick, a duly registered voter, voted for plaintiff David A. Canel for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1972 election for judicial retention. He desires to vote for plaintiff Canel's retention in the election to be held in November of 1978, and for the election and retention in future elections of other judges in the class of plaintiff judges. (Comp., ¶ 14(b)).

9. Plaintiff Albert W. Williams, a duly registered voter, voted for plaintiff Archibald J. Carey, Jr. for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention. He desires to vote for plaintiff Carey's retention in the future and for election and retention in future elections of other judges in the class of plaintiff judges. (Comp., ¶ 14(c)).

10. Defendant James R. Thompson is the Governor of the State of Illinois. (Comp., ¶6).

11. Defendant State Board of Elections of the State of Illinois was created by the General Assembly and serves, pursuant to Ill. Rev. Stat., ch. 46, § 1A-1, *et seq.*, to perform duties assigned to it by law. Defendants Michael Lavelle, as Chairman and member, and Don Adams and Franklin Lunding, Jr., as members, are presently the appointed and acting members of the State Board of Elections of the State of Illinois and are vested by law with the administration of the duties of the Board. (Comp., ¶ 7).

12. Defendant Michael J. Bakalis is Comptroller of the State of Illinois. (Comp., ¶ 8).

13. Defendant Alan J. Dixon is the Secretary of State of Illinois. (Comp., ¶ 9).

14. Defendant Roy O. Gulley is the Director of the Administrative Office of the Illinois Courts. (Comp., ¶ 10).

15. Under the terms of the Act, each named plaintiff judge will be mandatorily retired on the first Monday in December, 1978. It is conceded by all parties that the above-named state official defendants will take various actions, in accordance with the statutes and Illinois constitutional provisions governing their duties, to enforce the provisions of the Act, unless they are enjoined by order of this court.

16. Defendants John J. McDonnell, Lehman Krause, James Edward Dull and W. R. Todd and intervening defendants Allen Hartman, Brian B. Duff, David J. Shields, James A Zafiratos, Michael P. Toomin, Marvin Ruttenberg, and James J. Heyda are each candidates nominated for judicial offices in Illinois which defendants assert will become vacant in December, 1978 by reason of the Act. (Comp., ¶ 10A).

17. Under the Illinois Constitution of 1870, before 1964, a great number of judicial offices existed in Illinois below the level of the Illinois Supreme Court and the Illinois Appellate Court. Under various provisions of that Constitution, there were circuit courts, city and village courts, municipal courts, county courts, probate courts, and in Cook County, the superior court and the criminal court, as well as justices of the peace courts which were authorized pursuant to various statutes and municipal ordinances. Ill. Const. 1870, Art. VI. (Def.Ex. 2, CH3-CH7).

18. Prior to 1964, all judicial officers in Illinois were required, at the end of their elected terms, to stand for re-election. Each sitting judge was required, at the end of his elected term, either to step down, or stand for re-election in a partisan contest. Thus, the entire judiciary was the periodic subject of partisan political contest. Ill. Const. 1870, Art. VI. (Def.Ex. 2, CH3-CH7).

19. Under this Constitutional scheme, between 1870 and 1964, there was no provision for mandatory retirement of judges in Illinois. There were only two methods of removing any judge from the bench for any reason, including disability for age. The first method was pursuant to Article VI, Section 30 of the 1870 Illinois Constitution:

> "The general assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three-fourths of all the members elected, of each house." Ill. Const. 1870, Art. VI, § 30. (Def.Ex. 2, CH 6).

The second method was through an impeachment proceeding pursuant to Article V, Section 15, grounds for impeachment being limited to "any misdemeanor in office." An impeachment was required to be voted by a majority of the House of Representatives and tried before the Senate. A two-thirds vote was necessary for conviction. Ill. Const. 1870, Art. V, § 15.

20. On November 6, 1962, the People of the State of Illinois, through the Constitutional amendatory process, radically changed the structure of the Illinois judiciary and method of selection and retention of judges in Illinois. No longer were judges required to run, every four or six years, for re-election to office in a partisan political campaign. Instead, the device of initial judicial election and then retention, unique to judicial offices in Illinois, was adopted:

> "Not less than six months prior to the general election next preceding the expiration of his term of office, any judge previously elected may file in the office of the Secretary of State a declaration of candidacy to succeed himself, and the Secretary of State, not less than 61 days prior to the election shall certify such candidacy to the proper election officials. At the election the name of each judge who

has filed such a declaration shall be submitted to the voters, on a special judicial ballot without party designation, on the sole question whether he shall be retained in office for another term. The elections shall be conducted in the appropriate judicial districts, circuits, counties and units. The affirmative votes of a majority of the voters on the question shall elect him to the office for another term commencing the first Monday in December following the election. Any judge who does not file a declaration within the time herein specified, or, having filed, fails of re-election, shall vacate his office at the expiration of his term, whether or not his successor, who shall be selected for a full term pursuant to Section 10 of this Article, shall yet have qualified." Ill. Const. 1870, Art. VI, § 11, amended November 6, 1962, effective January 1, 1964. (Def.Ex. 2, CH9).

21. The purpose of the provision concerning the new procedure of judicial retention was as follows:

"1. SECURITY OF TENURE IN OFFICE ASSURING INDEPENDENCE OF JUDGES

"Judges of all courts will be nominated and elected in the first instance as under the present Constitution, but once elected, each judge will be entitled at the expiration of his term to run for retention in office solely on his own record, without opposition and without party designation. All judges in office on January 1, 1963 will have this right. Thus a judge is freed from dependence upon partisan politics. This security will be conducive to impartial and even-handed justice and will encourage able lawyers to give up their law practice to run for the bench, thereby assuring good candidates for judicial office. Moreover, the voters will have a greater voice in the selection of judges because of the requirement that they be voted on at general elections, when the largest number of people vote, rather than at special judicial elections." *Id.*, § 1. (Def.Ex. 2, CH12).

22. The amendments to the Judicial Article of the Illinois Constitution which were adopted in 1962 also provided mechanisms for removal of judges which were less cumbersome than the prior devices of impeachment or recall by the General Assembly. Section 18 of the Judicial Article approved by the voters of Illinois in 1962 provided:

"Notwithstanding the provisions of this Article relating to terms of office, the General Assembly may provide by law for the retirement of judges automatically at a prescribed age; and, subject to rules of procedure to be established by the Supreme Court and after notice and hearing, any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that court, two judges of the Appellate Court selected by that court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate.

"Any retired judge may, with his consent, be assigned by the Supreme Court to judicial service, and while so serving shall receive the compensation applicable to such service in lieu of retirement benefits, if any." *Id.*, § 18. (Def.Ex. 2, CH9-CH10).

23. The provision authorizing mandatory retirement of judges was linked to the device of judicial retention. Without mandatory retirement, it was perceived by the drafters of the 1962 amendments to the Judicial Article of the Illinois Constitution of 1870 that the result of the device of judicial retention would be a judiciary in Illinois increasingly composed of elderly judges. The purposes of authorizing mandatory retirement of Illinois judges was to reduce seniority on the bench by providing a time when judges would ultimately leave the bench and make way for others to assume the bench. (Tr. 760, 773-774).

24. The effective date of the new Judicial Article of the Illinois Constitution of 1870, which was ratified by the voters of Illinois on November 6, 1962, was January 1, 1964. (Def.Ex. 2, CH10).

25. In 1965, the Illinois General Assembly enacted "An Act relating to the compulsory retirement of judges," ("The Act"), effective July 20, 1965, which provided:

"§ 1. A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

"§ 2. The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

"Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters."

The provisions of the Act now appear in Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977).

26. The only stated and recorded purpose of the Act was:

". . . to insure a more vigorous judiciary to which the public is entitled." (Def.Ex. 3, H10; Tr. 757-759).

27. The obvious purpose of the provisions of Section 2 of the Act, which suspended the effectiveness of Section 1 of the Act, was to adapt the Act to incumbent members of the Illinois judiciary who, on the effective date of the Act, had assumed the bench prior to the constitutional amendments of 1962 which authorized mandatory retirement of Illinois judges. (Ill. Const. 1870, Art. VI; Tr. 724, 730-731). Reading the Act *in pari materia* with the Illinois Pension Code as it pertained to judges in Illinois in 1965, the purpose of the first date, January 1, 1976, was to insure that judges in office on January 1, 1964 (the effective date of the 1962 Judicial Article) would earn a minimum pension based on 12 years' service. The purpose of the provision allowing for a total of 18 years of judicial service was to allow those judges to earn a maximum judicial pension. *See,* Ill. Rev. Stat., ch. 108½, § 18-124 (1977).

28. Judging is largely an intellectual function which must be performed in a fair and even-handed way. A vigorous judiciary is one with experience; one which stays abreast of changes in the law; which can listen and read attentively; assimilate complex facts; reach findings and conclusions on the basis of those facts; apply the law to those facts to arrive at judgments; be fair and open-minded, and yet decisive. A vigorous judiciary must also have the physical ability to put in a full day of judicial work. In Illinois outside of Cook County, this can require a Circuit Judge to do substantial amounts of travelling on a day-to-day basis in the discharge of the duties of his office. (Tr. 180-183; 225-229; 267-269; 325-335; 777-779; Def.Ex. 5).

29. There is substantial agreement among experts in psychology, based upon scientific research which has been published on a continuing basis since the 1940's, that the following phenomena with respect to human intellectual function are observed to be associated with age:

a. Language skills and the accumulation of concrete knowledge tend to increase through the fifth

decade of life, for active, intelligent, competent working people, after which time these functions tend to reach a plateau and tend not to decrease until just prior to death.

b. Two core abilities of human intellectual function, intellectual speed and intellectual flexibility, tend to decrease or slow down after the fourth decade of life, with the decline in these core abilities becoming increasingly rapid after the sixth decade of life.

c. The efficiency of the retrieval of information from memory, particularly the retrieval of relatively new information, tends to show a significant decrement in the sixth and seventh decades of life.

(Tr. 843-845; 853-919; 975-977). The terms "after the sixth decade of life" and "between the sixth and seventh decades of life" refer to the ages of 65 to 75. (Tr. 846).

30. There is substantial agreement among experts in psychology, based upon scientific research which has been published on a continuing basis since the 1940's, that in the period of human life beyond the sixth decade, the ability to attend to complex conceptual and factual matters, and the ability to draw fine distinctions, tend to deteriorate due to increasing distractability, decreasing ability to focus attention, increasing difficulty in dealing with unfamiliar information, and increasing difficulty in processing information rapidly. (Tr. 845; 853-919).

31. There is sharp debate among experts in psychology as to whether these phenomena which have been observed to be associated with age are caused by age alone, or by some other combination of factors. (Tr. 846-847; 978). There is, however, relatively little debate among experts in psychology with respect to the truth and validity of the observations stated in paragraphs 29 and 30, above, and the fact of the association of these phenomena with age. (Tr. 846-847; 978).

32. The observations described in paragraphs 29 and 30 above, are highly relevant to the judicial function and a vigorous judiciary, since they involve the essences of the decisional processes of a judge. (Tr. 180-183; 225-229; 267-269; 823-830).

33. A study published in 1964 by plaintiffs' expert Dr. Neugarten, which culminated ten years of research, showed a deterioration of seven personality factors when subjects in the age group of 63 to 71 were compared with subjects in the age group of 50 to 58. A comparison of those groups showed that the older group was more dogmatic, relied to a greater extent upon unsupported views, tended to express themselves more idiomatically, was less concerned with causality, was more self-indulgent, was more concerned with and oriented to the past than the future, and was less concerned with learning. (Tr. 443-460). These personality factors are critical to the judicial function and a vigorous judiciary, since the deterioration noted would adversely affect qualities of personality essential to fair and even-handed discharge of the judicial function. (Tr. 180-183; 225-229; 267-269; 443-460).

34. During the course of its deliberations in 1963 and 1965 on the subject of a mandatory retirement age for Illinois judges, the Illinois General Assembly considered alternatives between the ages of 65 and 75. At that time, age 65 was the usual age for retirement for most vocations. The age of 70 was chosen for the retirement of Illinois judges for two reasons: first, judging is more an intellectual than a physical endeavor, and second, to secure the benefits to the State of Illinois of an additional five years' experience and service from its judges. (Tr. 726-728; 753-755).

35. The Sixth Illinois Constitutional Convention, in 1970, was aware of the existence of the Act, and thereafter proposed for adoption, among other provisions, sections 15(a) of Article VI of the Illinois Constitution of 1970, which provides in part that: "The General

Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age." That provision was ratified with the Illinois Constitution of 1970. (Def.Ex. 4, p. 2; Ill. Const. 1970, Art. IV, § 15(a)).

36. In 1973, the Illinois General Assembly enacted the following addition as an amendment to the Act:

> "The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term."

(Def.Ex. 3, H38-H56). That provision is now codified in Ill. Rev. Stat., ch. 37, § 23.72 (1977). The purpose of that provision was to allow certain Illinois judges to qualify for a minimum pension. (Tr. 733-736).

37. Of the various provisions in section 2 of the Act, which suspend the provisions of section 1 of the Act, the only provision which continues to have any effect is the provision which permits a judge in office on July 20, 1965, to continue to service until ". . . the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act." After December, 1978, that provision will apply to three Illinois judges. (Tr. 321-322).

38. The Illinois Constitution of 1970 carried forward the device of judicial retention, which is still unique to judges in Illinois. (Ill. Const. 1970, Art. VI, § 12(d)).

39. Illinois judges are, and since 1964 have been, unique among publicly-selected officials of state government in Illinois by virtue of the nature of their duties, and their tenure in office afforded by the device of judicial retention. (Ill. Const. 1870, Art. IV, V, VI; Ill. Const. 1970, Art. IV, V, VI).

40. No other publicly-selected officials of state government in Illinois are subject to a mandatory retirement age. *See,* Ill. Rev. Stat., ch. 46, § 25-2 (1977).

41. Between January 1, 1964 and July 1, 1971, Illinois judges not mandatorily retired in accordance with the Act were subject to the following provision of the Illinois Constitution:

> ". . . [S]ubject to rules of procedure to be established by the Supreme Court and after notice and hearing, any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that court, two judges of the Appellate Court selected by that court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate." Ill. Const. 1870, Art. VI, § 18, amended November 6, 1962, effective January 1, 1964.

42. Since July 1, 1971, Illinois judges not mandatorily retired in accordance with the Act have been subject to the following provisions of the Illinois Constitution:

> "(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of the Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.
>
> "(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate

Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

"(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

"(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

"(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

"(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission." Ill. Const. 1970, Art. VI, § 15(b)-(g).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action. 28 U.S.C. §§ 1331, 1343(3), 1343(4), 42 U.S.C. § 1983. This is an appropriate action for declaratory relief. 29 U.S.C. §§ 2201, 2202. This Court has pendent jurisdiction of the claims presented under Illinois law. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

2. The class of plaintiff Illinois judges hold office by virtue of a privilege granted by the State of Illinois. *Napolitano* v. *Ward,* 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied,* 409 U.S. 1037, *reh. denied,* 410 U.S. 947 (1973).

3. The class of plaintiff Illinois judges have no fundamental right to government employment. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976).

4. Age does not constitute a suspect class for purposes of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Murgia, supra,* at 313-314; *Gault* v. *Garrison,* 569 F.2d 993 (7th Cir. 1978).

5. Whether the Act violates the rights of the class of plaintiff Illinois judges under the equal protection clause of the Fourteenth Amendment to the United States Constitution by mandating retirement of Illinois judges at age 70 is to be determined by whether the retirement of judges at age 70 is rationally related to the objective of the Act, ". . . to insure a more vigorous judiciary to which

the public is entitled," and whether the Act rationally furthers that purpose. *Murgia, supra,* at 314; *Gault, supra,* at 995.

6. The Act is presumed to be valid. *Murgia, supra,* at 314.

7. *Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 78-79 (1911), sets forth the following rules which govern the assessment of the constitutionality of the Act:

> "1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Murgia, supra, at 314 n.5; *Gault supra,* at 995.

8. Scientific observations since the 1940's have shown an association between age and decline in human intellectual function and personality factors during the sixth and seventh decades of life, between the ages of 65 and 75. These scientific observations had been published as of the time the Illinois General Assembly considered and enacted the Act. There was at that time, and continues to be, substantial scientific agreement about the fact of the associations which have been observed. These scientific observations sustain the retirement age of 70 for Illinois judges mandated by the Act. *Murgia, supra.*

9. The equal protection clause of the Fourteenth Amendment to the United States Constitution does not require that the Illinois General Assembly have probed the scientific cause of the observed association between age and decline in human intellectual function and personality factors. *Lindsley, supra; Murgia, supra.*

10. There is debate, since the enactment of the Act, among scientists as to the cause of the observed associations between entry into the sixth and seventh decades of life and the noted decline in human intellectual function and personality factors. The fact of such debate is insufficient basis to invalidate the Act. *United States* v. *Thorne,* 325 A.2d 764, 768 (D.C.App. 1974); *United States* v. *Brookins,* 383 F. Supp. 1212 (D.N.J. 1974).

11. The question raised by this action is not whether the Act precisely filters out those, and only those, who are in the factual position which generated the concern reflected in the Act. Nor is the question whether the Act filters out a substantial part of the class which caused the concern of the Illinois General Assembly or whether it filters out more members of the class than non-members. The question is whether the Illinois General Assembly, its concern having been reasonably aroused by the possibility of the problem of a non-vigorous judiciary which it legitimately sought to avoid, could have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. *Weinberger* v. *Salfi,* 422 U.S. 749, 776-777 (1975); *Murgia, supra,* at 316.

12. Retirement of Illinois judges at age 70 pursuant to the Act is rationally related to the objective of the Act, ". . . to insure a more vigorous judiciary to which the public is entitled," and rationally furthers that purpose. *Murgia, supra,* at 314-317; *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir. 1975), *cert. denied,* 423 U.S. 891 (1975); *McIlvaine* v. *Pennsylvania State Police,* 309 A.2d 801

(Pa. 1973), *appeal dismissed for want of substantial federal question,* 415 U.S. 986 (1974); *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D.D.C. 1974), *aff'd summarily,* 420 U.S. 940 (1975); *Cannon* v. *Guste,* 423 U.S. 918 (1975), *aff'g* No. 74-3211 (May 6, 1975, E.D.La.); *Johnson* v. *Lefkowitz,* 566 F.2d 866 (2d Cir. 1977); *Talbot* v. *Pyke,* 533 F.2d 331 (6th Cir. 1976); *Klain* v. *Pennsylvania State University,* 434 F. Supp. 571 (M.D. Pa. 1977); *Weiss* v. *Walsh,* 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd without opinion,* 461 F.2d 846 (2d Cir. 1972), *cert. denied,* 409 U.S. 1129 (1973); *Palmer* v. *Ticcione,* 433 F. Supp. 653 (E.D. N.Y. 1977); *Armstrong* v. *Howell,* 371 F. Supp. 48 (D. Neb. 1974); *Aronstam* v. *Cashman,* 325 A.2d 361 (Vt. 1974); *Nelson* v. *Miller,* 480 P.2d 467 (Utah 1971).

13. The class of plaintiff judges have taken office for terms clearly established by the Illinois General Assembly and they are properly subject to the conditions imposed by the state upon the length of their terms. *Rubino* v. *Ghezzi,* 512 F.2d 431, 433 (2d Cir. 1975); *Gordon* v. *Leatherman,* 450 F.2d 562, 565 (5th Cir. 1971).

14. Since Illinois judges hold an office unique among publicly-selected officials of state government in Illinois, the State of Illinois may permissibly provide for mandatory retirement of judges while not so providing for other publicly-selected officials of state government. *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940); *Martin-Trigona* v. *Underwood,* 529 F.2d 33 (7th Cir. 1975); *Lefkovits* v. *State Board of Elections,* 400 F. Supp. 1005 (N.D. Ill. 1975), *aff'd summarily,* 424 U.S. 901 (1975).

15. That the State of Illinois affords judges not mandatorily retired a hearing before the Illinois Courts Commission prior to removal does not deny the class of plaintiff judges equal protection of the laws. *Cannon* v. *Guste,* 423 U.S. 918 (1975), *aff'g* No. 74-3211 (May 6, 1975, E.D. La.). *See, Id.,* Jurisdictional Statement, and Motion to Affirm. *See also, Hicks* v. *Miranda,* 422 U.S. 332 (1975); *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246 (1959).

16. None of the provisions of Section 2 of the Act or the amendment of 1977 deny the class of plaintiff judges equal protection of the laws, since the State of Illinois may reasonably adapt mandatory judicial retirement to a situation where some judges who had been elected prior to any provision for mandatory retirement had substantial interests in completing their terms of office and securing their judicial pensions. *City of New Orleans* v. *Dukes,* 427 U.S. 297, 305 (1976); *Sperry and Hutchinson Co.* v. *Rhodes,* 220 U.S. 502, 505 (1910); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1934); *Watson* v. *Maryland,* 218 U.S. 173 (1910); *Dent* v. *West Virginia,* 129 U.S. 114 (1889); *Stephens* v. *Dennis,* 293 F. Supp. 589 (N.D. Ala. 1968); *Wasmuth* v. *Allen,* 252 N.Y.S.2d 65 (1964); *Brooks* v. *State Board of Funeral Directors and Embalmers,* 195 A.2d 728, 738 (Md. 1963); *Beeman* v. *Michigan Board of Pharmacy,* 35 N.W.2d 354 (Mich. 1949); *Rosenblatt* v. *California State Board of Medical Examiners,* 140 P.2d 1089 (Cal. 1914).

17. The rights of the class of plaintiff voters do not exceed the rights of the class of plaintiff judges. Since the class of plaintiff judges are lawfully subject to the terms of the Act, no rights of the class of plaintiff voters are impaired. *Manson* v. *Edwards,* 482 F.2d 1076, 1078 (6th Cir. 1973); *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir. 1975), *cert. denied,* 423 U.S. 89 (1975); *Blassman* v. *Markworth,* 359 F. Supp. 1 (N.D. Ill. 1973).

18. Since the framers of the Illinois Constitution of 1970 were aware of the provisions of the Act, and since it is not inconsistent with Article VI, section 15(a) of the Illinois Constitution of 1970, the Act does not violate that constitutional provision by failing to prescribe *a* retirement age. Furthermore, once the pension formula exceptions have run their course the Act will prescribe *a* retirement age. Smith-Hurd Ill. Anno. St., Commentary to Art. VI, § 15(a), Ill. Const. 1970; Ill. Const. 1970, Transition Schedule, § 9; *City of Chicago* v. *Pollution Control Board,* 59 Ill.2d 484, 322 N.E.2d 11 (1975).

19. Public Act 80-1057 does not violate Article VI, section 12(d) of the Illinois Constitution of 1970. Public Act 80-1057 does not prescribe a time within which a judge seeking retention must file a declaration of candidacy to succeed himself which is "less than six months before the general election preceding the expiration of his term of office . . ." § 12(d). Indeed, the Act requires filing well before the constitutional six-month deadline. The purpose of this advancement of the filing deadline was to enable the electorate at the ensuing primary and general elections to fill judicial vacancies occasioned by judges who decided not to seek retention.

FINAL JUDGMENT

Accordingly, on the basis of the foregoing Findings of Fact and Conclusions of Law, judgment is hereby entered for the defendants and against the plaintiffs as to all issues raised by Counts I, II, and III of the Second Amended Complaint, all parties to bear their own costs and attorneys' fees.

ENTER: /s/ Prentice H. Marshall, Judge
Prentice H. Marshall, Judge

Dated: July 11, 1978

ILLINOIS STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 37, Ill. Rev. Stats. (1977) §§ 23.71, 23.72; Laws 1965, p. 1792, § 1 and § 2 eff. July 20, 1965, as amended by Public Act 78-805, § 1, effective September 12, 1973.

§ 23.71 Automatic retirement — Conclusion of pending matters

A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Laws 1965, p. 1792, § 1, eff. July 20, 1965.

§ 23.72 Continuance in office — Conditions — Date of retirement

The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Laws 1965, p. 1792, § 2, eff. July 20, 1965.

§ 23.72 Continuance in office — Conditions — Date of retirement

The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

The provisions of Section 1 of this Act are aso suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.

Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Amended by P.A. 78-805, § 1, eff. Sept. 12, 1973

CONSTITUTION OF ILLINOIS 1970 ARTICLE VI
(Emphasis supplied.)

• • •

§ 10. *Terms of Office*

The terms of office of Supreme and Appellate Court Judges shall be ten years; of Circuit Judges, six years. . .

§ 11. *Eligibility for Office*

No person shall be eligible to be a Judge or Associate Judge unless he is a United States citizen, a licensed at-

torney-at-law of this State, and a resident of the unit which selects him. No change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change.

§ 12. *Election and Retention*

(a) Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

(b) The office of a Judge shall be vacant upon his death, resignation, retirement, removal, or upon the conclusion of his term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 64 days before the election,

shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

(e) A law reducing the number of Appellate or Circuit Judges shall be without prejudice to the right of the Judges affected to seek retention in office. A reduction shall become effective when a vacancy occurs in the affected unit.

• • •

§15(a) *The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age.* • • •

(b) *A Judicial Inquiry Board is created.* The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with *willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties.* All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) *to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physicially or mentally unable to perform his duties.*

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission.

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

No. 78 C 1036

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and MICHAEL LAVELLE, as Chairman and Member, and DON ADAMS, and FRANKLIN LUNDING, JR., as Members of the State Board of Elections of the State of Illinois; and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD,

Defendants,

and

ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN M. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Intervenor Defendants.

SECOND AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiffs by their attorney complain against Defendants as follows:

COUNT I

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Sections 1343(3), 1343(4), 1331, 2201 and 2202. This is a civil action authorized by Title 42 U.S.C. Section 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. This proceeding is for a declaratory judgment that certain acts and practices of Defendants violate the aforementioned rights secured by the Constitution of the United States. This action also seeks injunctive and other equitable relief against the acts and practices complained of herein, and declaratory relief. The matters in controversy exceed the value of $10,000 exclusive of interest and costs and arise under the Constitution of the United States.

Parties

1A. Plaintiff BENJAMIN NELSON is a Judge of the Circuit Court of Cook County, Illinois, and holds said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on December 6, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated as Exhibit F. He is a citizen of the United States and a resident of the Northern District of Illinois.

2. Plaintiff RAYMOND E. TRAFELET is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on

November 30, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit A. He is a citizen of the United States and a resident of the Northern District of Illinois.

3. Plaintiff DAVID A. CANEL is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on November 30, 1972, which certified his right to hold said office until the first Monday in December of 1978, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit B. He is a citizen of the United States and a resident of the Northern District of Illinois.

4. Plaintiff ARCHIBALD J. CAREY, JR. is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on November 30, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit C. He is a citizen of the United States and a resident of the Northern District of Illinois.

5.(a) Plaintiff PETER FITZPATRICK is a duly registered voter who resides in Cook County, Illinois. He is an attorney admitted to practice in Illinois. He is a citizen of the United States and a resident of the Northern District of Illinois.

(b) Plaintiff ALBERT W. WILLIAMS is a duly registered voter who resides in Cook County, Illinois. He was Chairman of the Board, No. Carolina Mutual Life Ins. Co. He is a citizen of the United States and a resident of the Northern District of Illinois.

(c) Plaintiff, MELVIN B. LEWIS, is a duly registered voter who resides in Cook County, Illinois. He is Professor of Law at John Marshall Law School. He is a

citizen of the United States and a resident of the Northern District of Illinois.

6. JAMES R. THOMPSON ("THOMPSON") is the Governor of Illinois.

7. Defendant STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS ("BOARD") was created by the General Assembly and serves pursuant to Ill. Rev. Stats., Ch. 46, §1A-1, *et seq.*, to perform duties assigned to it by law. Defendants MICHAEL LAVELLE, as Chairman, and member, and DON ADAMS, and FRANKLIN LUNDING, JR., as members, are presently the appointed and acting members of the STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS (hereinafter collectively "BOARD MEMBERS") and are vested by law with the administration of the duties of the BOARD.

8. Defendant MICHAEL J. BAKALIS is Comptroller of the State of Illinois.

9. Defendant ALAN J. DIXON is the Secretary of State of Illinois.

10. Defendant ROY O. GULLEY is the Director of the Administrative Office of the Illinois Courts.

10A. Defendants JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL and W. R. TODD and Intervening Defendants ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A ZAFIRATOS, ANTHONY J. BOSCO, MELVIN M. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA are each candidates nominated for judicial offices in Illinois which defendants assert will become vacant in December of 1978 by reason of the mandatory retirement provisions pertaining to Illinois judges, which are complained of herein, to wit:

Candidate Defendants	Judge For Whose Purported Vacancy They Are Candidates	Pertinent Court
Allen Hartman Brian Duff	Justice Mayer Goldberg	Appellate Court, First District
David Shields	Judge David A. Canel	Circuit, Cook County
James Zafiratos Michael Toomin	Judge Archibald J. Carey	Circuit, Cook County
Anthony J. Bosco Melvin A. Landau	Judge Raymond Drymalski	Circuit, Cook County
John J. McDonnell	Judge Benjamin Nelson	Circuit, Cook County
Marvin H. Ruttenberg James J. Heyda	Judge Raymond A. Trafelet	Circuit, Cook County
Lehman Krause James E. Dull	Judge Alvin L. Williams	2d Circuit, Jefferson County
W. R. Todd	Judge E. Harold Wineland	11th Circuit, Clay County

Each said defendant and intervening defendant claims or may claim an interest in this proceeding, though plaintiffs aver that said defendants have no rights in the premises.

Class Action

11.(a) Plaintiffs Trafelet, Canel, Nelson and Carey, bring this action on their behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other Judges of the Circuit Court of Cook County and all other counties of the State of Illinois who are, or will be, subject to mandatory retirement under Illinois law at the age of 70 before the end of their certified terms of office or who will be denied the right to run for retention of their said office because they have attained or will attain the age of 70. The persons in the class referred to are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class: the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the Defendants have acted and will act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. Moreover, the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant parties opposing the class.

(b) Plaintiffs Peter Fitzpatrick, Albert W. Williams, and Melvin B. Lewis bring this action on their behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other registered voters of Cook County and all other counties of the State of Illinois who are, or will be denied the opportunity to vote for the judicial candidates of their choice because the judicial candidates of their choice are, or will be, subject to mandatory retirement under Illinois law at the age of 70. The persons in the class referred to are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of

the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the Defendants have acted and will act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. Moreover, the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant parties opposing the class.

Facts

12.(a) Plaintiffs Trafelet, Nelson and Carey are willing, qualified, desirous, and fully able in all respects to continue to serve as Judges of the Circuit Court to the end of their elected terms in 1982. Plaintiff Canel is willing, desirous, qualified and fully able in all respects to serve as a Judge of the Circuit Court beyond the end of his current term in 1978, and he has filed with the Illinois Secretary of State DIXON his declaration of candidacy to succeed himself in retention election to be held in November of 1978, all pursuant to Article 6, ¶12(d) of the Illinois Constitution of 1970, a true copy of which declaration of candidacy is attached hereto and incorporated herein as Exhibit D.

(b) As shown hereinbelow, were it not for the mandatory retirement requirements under Illinois law of which complaint is made herein, Plaintiffs Trafelet, Nelson and Carey would be entitled to serve as judges to the end of their respective terms in 1982, and Plaintiff Canel would be entitled to stand for election in 1978 on the retention ballot for Judges of the Circuit Court of Cook County, but each Judge Plaintiff is barred by such mandatory retirement from doing so entirely because of their respective ages.

13.(a) Plaintiff Canel was born June 19, 1906, and attained his 70th birthday on June 19, 1976. He was first

elected as a Judge of the Circuit Court of Cook County in 1959, and was retained by retention elections for judges in 1966 and 1972, certified as aforesaid.

(b) Plaintiff Trafelet was born June 13, 1907, and attained his 70th birthday on June 13, 1977. He was first elected as a Judge of the Circuit Court of Cook County in 1968, and was retained by retention elections for judges in 1970 and 1976, certified as aforesaid.

(c) Plaintiff Nelson was born March 6, 1904, and attained his 70th birthday on March 6, 1974. He was first elected as a Judge of the Municipal Court of Chicago in 1960 and thereafter by law became a judge of the Circuit Court of Cook County, and was retained by retention elections for judges in 1964, 1970, and 1976, last certified as aforesaid.

(d) Plaintiff Carey was born February 29, 1908, and attained his 70th birthday on March 1, 1978. He was first elected as a Judge of the Circuit Court of Cook County in 1966, and was retained by retention elections for judges in 1970 and 1976, certified as aforesaid.

14.(a) MELVIN B. LEWIS, as a duly registered voter, voted for Plaintiff Raymond E. Trafelet for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention, and he wants to vote for Trafelet's retention in the future and for election and retention of some other Judges in the Judges class. But his said vote in 1976 has been nullified and he is denied the right to vote for the judicial candidate of his choice because of the mandatory retirement provision in the Illinois law which requires judges to retire at the age of 70.

(b) PETER FITZPATRICK, as a duly registered voter, voted for Plaintiff David A. Canel for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1972 election for judicial retention and he wants to vote for Canel's retention in the election to be held in November of 1978, and for election and retention in future

elections of other Judges in the Judges class. But he is denied the right to vote for the judicial candidate of his choice because of the mandatory retirement provision in the Illinois law which requires judges to retire at the age of 70.

(c) ALBERT W. WILLIAMS, as a duly registered voter, voted for Plaintiff Archibald J. Carey, Jr. for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention and he wants to vote for Carey's retention in the future and for election and retention in future elections of other judges in the Judges class. But his said vote in 1976 has been nullified and he is denied the right to vote for the judicial candidate of his choice in the future because of the mandatory retirement provision in the Illinois law which requires judges to reire at the age of 70.

15. The Constitution of Illinois (1970), Article 6, provides in pertinent part as to Judges and election or retention of Circuit Judges in Illinois and the duties of the Secretary of State pertaining to retention of judges:

§ 10. Terms of Office

The terms of office of Supreme and Appellate Court Judges shall be ten years; of Circuit Judges, six years. . . .

§ 11. Eligibility for Office

No person shall be eligible to be a Judge or Associate Judge unless he is a United States citizen, a licensed attorney-at-law of this State, and a resident of the unit which selects him. No change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change.

§ 12. Election and Retention

(a) Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A

person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

(b) The office of a Judge shall be vacant upon his death, resignation, retirement, removal, or upon the conclusion of his term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and

Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

(e) A law reducing the number of Appellate or Circuit Judges shall be without prejudice to the right of the Judges affected to seek retention in office. A reduction shall become effective when a vacancy occurs in the affected unit.

16. Pursuant to the foregoing provisions, the Illinois Legislature has provided for the election and retention of Circuit and other Judges of Illinois in The Election Code, Ch. 46, Ill. Rev. Stats. §1-1 et seq., and other statutes pursuant to which Defendants have *inter alia* the following duties applicable herein:

(a) The defendant Board and its members, upon receipt from county and local election authorities of the official canvassas of elections for judges, is to certify and transmit to the defendant State Controller a list of persons elected to judicial vacancies, or retained in office. Also, the Defendant Board transmit to the Supreme Court the names of persons elected to judgeships in adversary elections and the names of judges who win or fail to win retention in office. In addition, the Defendant Board causes to be placed on the retention ballot the names of judges seeking retention.

(b) Upon receipt of certificate from the Defendant Board, the State Controller is to include all certified persons for payments by the State for judicial duties, and thereupon exclude from such payments all persons formerly Judges whose positions became vacant, or were not retained.

(c) The defendant Governor is to issue certificates of election to persons newly elected as judges to fill the vacancies existing in judicial offices, or who were retained in office.

(d) Defendant Gulley causes Judges to be barred from and taken off the State Judicial Payroll pursuant to the mandatory retirement act, and he causes other persons elected to the supposed vacancies of the mandatorily retired judges to be added to that payroll.

(e) The defendant Secretary of State is to accept declarations of candidacy for judges seeking retention and certify same to the proper local election officials and the defendant Board and its members. However, pursuant to Public Act 80-1057 enacted over veto effective November 23, 1977, Ch. 46, Ill. Rev. Stats. §7A-1, the Illinois Legislature has further provided, contrary to the Article 6, §12(d) of the Illinois Constitution, that:

> "Any Supreme, Appellate or Circuit Judge who has been elected to that office and who seeks to be retained in that office under subsection (d) of Section 12 of Article VI of the Constitution shall file a declaration of candidacy to succeed himself in the office of the Secretary of State *on or before the first Monday in December before the general election preceding the expiration of his term of office.* The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election." (Emphasis added.)

Therefore, pursuant to Public Act 80-1057, the defendant Secretary of State will not accept any such declarations for the 1978 retention election filed after the first Monday in December of 1977, rather than accepting such filings up to six months prior to the 1978 election as permitted by the Illinois Constitution.

17. The Constitution of Illinois (1970) further provides in Article 6 in pertinent part that

> "§15(a) The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. • • •"

Pursuant to that provision, and prior authority the Illinois General Assembly adopted the following provisions in 1965 and 1973, Chapter 37, Ill. Rev. Stat. §§ 23.71, 23.72, pursuant to which Plaintiff Judges will lose their offices on December 4, 1978 and thereafter be disqualified from election or retention:

> § 23.71 Automatic retirement - Conclusion of pending matters
>
> A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the dispositions of such matters.
>
> Laws 1965, p. 1792, § 1, eff. July 20, 1965.
>
> § 23.72 Continuance in office — Conditions — Date of retirement
>
> The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including

> all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.
>
> Laws 1965, p. 1792, § 2, eff. July 20, 1965.
>
> § 23.72 Continuance in office—Conditions—Date of retirement
>
> The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.
>
> The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending

before him unless the Supreme Court makes other provisions for the disposition of such matters. Amended by P.A. 78-805, § 1, eff. Sept. 12, 1973.

18(a). The Constitution of Illinois (1970) further provides as to discipline and removal of judges, Article 6, §15:

(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with *willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties.* All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem

compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) *to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.*

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission.

(Emphasis supplied.)

(b). Pursuant to the foregoing Constitutional provisions, the Illinois Supreme Court has appointed a Judicial Inquiry Board and Courts Commission. Further, that Court established Standards of Judicial Conduct and other requirements, and has authorized discipline of Judges by the Courts Commission established by the Constitution for breach of those standards and requirements. Ch. 110A, Ill. Rev. Stats. §61 through §71 (Illinois Supreme Court Rules, §61 through §71).

19. No other elected official in Illinois is forced to retire or is disqualified from holding his elected office by reason of attaining a maximum age. All other elected officials in Illinois become disqualified from holding elected office pursuant to Chapter 46, Ill. Rev. Stats. §25-2, *Events on which elective office become vacant,* which provides:

> "Every elective office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:
>
> First — The death of the incumbent.
>
> Second — His resignation.
>
> Third — His becoming insane.
>
> Fourth — His ceasing to be an inhabitant of the State; or if the office is local, his ceasing to be an inhabitant of the district, county, town, or precinct for which he was elected; Provided, that the provisions of this paragraph shall not apply to township officers whose township boundaries are changed in accordance with section 3a of Article III of 'An Act to revise the law in relation to township organization', approved March 4, 1874, as amended.
>
> Fifth — His conviction of an infamous crime, or of any offense involving a violation of official oath.
>
> Sixth — His removal from office.
>
> Seventh — His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law.
>
> Eighth — The decision of a competent tribunal declaring his election void.
>
> No elective office, except as herein otherwise provided, shall become vacant until the successor of the incumbent of such office has been appointed or elected, as the case may be, and qualified." 1943, May 11, Laws 1943, Vol. 2, p. 1, §25-2.

20. Pursuant to the foregoing Constitutional provisions, statutes, and rules of the Illinois Supreme Court, were it not for the statutes mandating retirement and disqualification of judges who have attained the age of 70,

(a) Plaintiffs Trafelet, Nelson and Carey, having been duly retained and certified by Certificates of Election to serve until 1982, are entitled to serve until the expiration of their terms and thereafter seek retention in office, subject only to possible removal or discipline by the Courts Commission for reasons set forth in the Constitution and Illinois Supreme Court Rules and subject to the procedural rights afforded them under the Illinois and United States Constitutions and granted by the Inquiry Board and Commission.

(b) Plaintiff Canel, having been previously elected as a Judge of the Circuit Court to serve until 1978, is entitled, subject only to possible removal or discipline by the Courts Commission for reasons set forth in the Constitution and Illinois Supreme Court Rules and subject to the procedural rights afforded him under the Illinois and United States Constitutions and granted by the Inquiry Board and Commission, to declare his candidacy for retention in the election to be held in November of 1978, and have his candidacy for such retention certified by the Illinois Secretary of State to the proper election officials not less than 63 days before the election, to wit, no later than September 5, 1978.

21. Pursuant to the foregoing Constitutional provisions, statutes, and rules of the Illinois Supreme Court, were it not for the statutes mandating retirement and disqualification of judges who have attained the age of 70:

(a) Plaintiffs Lewis and Williams, being duly registered voters, would be able to vote for the judicial candidates of their choice, Trafelet and Carey respectively, for retention in the future, and for retention and election

of other members of the Judges class, and would not have their prior votes for Trafelet and Carey respectively diluted and nullified.

(b) Plaintiff Fitzpatrick, being a duly registered voter, would be able to vote for the judicial candidate of his choice, Canel, for retention in the November, 1978 election, and for retention and election of other members of the Judges class in that and future elections.

22. The Defendants hereto, and each of them, have, however, complied with, enforced, and have demonstrated their respective intent in the future unless restrained by this Court to comply with and enforce the mandatory requirement provisions as aforesaid pertaining to Judges, to wit Ch. 37, Ill. Rev. Stats. §§ 23.71, 23.72, so as to prevent Plaintiffs Trafelet and Carey and other judges similarly situated from holding their judicial offices until the completion of their respective terms, and so as to prevent Plaintiff Canel and others similarly situated from filing for retention, in the following particulars, to wit:

(a)(i) Defendant Dixon as Secretary of State has refused and will continue to refuse to certify to the State Board of Elections and other appropriate election officials no later than September 5, 1976, for inclusion on retention ballots Plaintiff Canel and all other judges similarly situated who have attained the age of 70 years, and therefore Canel and the others similarly situated will not appear on the retention ballot for Judges in the elections to be held in November of 1978, and subsequently.

(ii) Because of Public Act 80-1057, enacted as aforesaid effective November 23, 1977, the Defendant Secretary was not required to accept after the first Monday in December, 1977, declarations of candidacy from judges who desire to seek retention in the 1978 election and who may be members of the Plaintiff Judges' class entitled to benefit hereby but who believed their retirement was mandated

by the provisions complained of herein and who have therefore not heretofore filed for retention. The foregoing is so despite the Illinois Constitution which would permit such filings with the Defendant Secretary of State through May 7, 1978. One member of the Judges' class who was thereby affected was Judge E. Harold Wineland, who filed his declaration of candidacy in April, 1978, after learning of the pendency of this case, a true copy of which declaration is attached as Exhibit G.

(b) The State Board of Elections and its Chairman and Members have recognized and declared that the offices of Plaintiffs Trafelet, Canel, Nelson and Carey and all Judges similarly situated are and were vacant, and have certified that other persons currently are running for the supposed vacancies of the offices of these Judge Plaintiffs and such other judges, as is more fully shown by the List of Candidates published by those defendants for the state-wide primary election to be held March 21, 1978, a true copy of the pertinent portions of which applicable to judicial elections (pp. 78-79) is attached hereto and incorporated herein as Exhibit E. Accordingly, those defendants have in the past and will in the future, unless restrained by this Court, certify to the Governor and to the State Comptroller the election of persons other than these Judge Plaintiffs and other Judges similarly situated, to the supposed vacancies existing only by reason of the aforesaid mandatory retirement provisions of Illinois law. Also pursuant to the Secretary of State's refusal to certify Plaintiff Canel and all judges similarly situated to the State Board of Election and other appropriate election officials, the Defendant State Board, which sets up the retention ballots, has refused in the past and will refuse in the future, unless restrained by this Court, to put on the retention ballots the name of Judge Canel and all judges similarly situated

by reason of the aforesaid mandatory retirement provisions of Illinois law.

(c) The Governor of Illinois has in the past, and will continue to in the future, unless restrained by this Court, upon receipt of certificates from the State Board of Elections and its members of the election of new persons to supposed judicial vacancies created as aforesaid by mandatory retirement, issued and will continue to issue certificates of election to the persons supposedly elected to such vacancies.

(d) The Comptroller of Illinois has in the past, and will continue to in the future unless restrained by this Court, upon receipt of certificates and receipt of a list of persons from the State Board of Elections and its members of the election of new persons to supposed judicial vacancies created as aforesaid by mandatory retirement, provided for payment of salaries of such new persons and he has terminated and will continue to terminate plaintiff Judges and others similarly situated from receiving their salaries as Judges.

(e) Defendant Gulley has in the past removed and will continue in the future to remove from the Judicial payroll pursuant to the aforesaid mandatory retirement provision Plaintiffs Trafelet, Canel, Nelson and Carey and all judges similarly situated unless restrained by this Court. Further, Defendant Gulley has in the past and will continue in the future, unless restrained by this Court, to add to that payroll other persons elected to the supposed vacancies of the mandatorily retired judges.

23. Because Plaintiffs Trafelet and Carey were each first elected to the bench after July 20, 1965, neither of these Judge Plaintiffs is protected by the so-called "grandfather clauses" enacted as part of the mandatory retirement act, Ch. 37, Ill. Rev. Stats. §23.72(1)(2)(3). These Judge Plaintiffs are thus treated differently than judges

holding office prior to that date who are entitled to a minimum of 18 years of judicial service before retirement under §23.72(2), even if such 18 years extends beyond the age of 70. Plaintiffs Trafelet and Carey will, if permitted to complete 18 years of judicial service, be able to serve as follows:

(a) Plaintiff Trafelet, until 1986

(b) Plaintiff Carey, until 1984.

24. Each Judge Plaintiff has fulfilled the minimum eligibility requirements under the Judges Retirement System of Illinois, (Article 18 of the Illinois Pension Code, Ch. 108½, §18-1 et seq.) and therefore they do not benefit from the provisions of the mandatory retirement act suspending application of that act to permit each judge to fulfill such minimum eligibility standards, Ch. 37 Ill. Rev. Stats. §23.71, §23.72. However, under the Judges Retirement System of Illinois as aforesaid, the vested pension right of each judge increases with the number of years he serves. Thus, each Judge Plaintiff will, if forced to retire at the end of 1978, pursuant to mandatory retirement provisions, lose substantial pension rights which would otherwise have vested in them by reason of continued service as judges. Moreover, the Judge plaintiffs are treated differently than judges protected from retirement at age 70 by §23.72 as amended in 1973, as are many members of the Judges class.

25. By reason of the mandatory retirement provisions applicable to judges, the Judge Plaintiffs and each of them are about to lose their judicial positions without any fault on their part and without a showing of any misconduct or demonstrated physical or mental inability to serve pursuant to the hearings and procedural requirements for discipline or removal of judges, as is required and provided by the Constitution of Illinois and Rules of Illinois Supreme Court as aforesaid; while judges who have not attained 70 years of age are entitled to hold office unless removed or disciplined pursuant to those Illinois Constitutional requirements and Supreme Court

Rules, and while many other judges older than 70 years of age were and are protected and remain eligible to continue in judicial office by reason of the 1965 "grandfather clauses" and 1973 savings clause and amendment. Further the Judge Plaintiffs are denied their rights to run for retention or re-election to judicial office.

26. The Mandatory Retirement Act, Ch. 37 Ill. Rev. Stats. §23.71, §23.72, which operates to remove judges from office at age 70 is not rationally related to any legitimate object of that Statute or the State of Illinois, in that:

(a) No state purpose for the mandatory retirement of judges at age 70 is articulated in the Act;
(b) No identifiable State purpose exists for the mandatory retirement of judges at age 70;
(c) No relationship exists between forced retirement at age 70 and an individual judge being unfit to perform his judicial duties after age 70; and
(d) No judges who are unfit are excluded by the Act, or in the alternative so few judges who are unfit are excluded, as to render the age 70 classification unrelated to the objective of the State, if in fact the State's objective is to exclude unfit judges.

27. The Mandatory Retirement Act, Ch. 37 Ill. Rev. Stats. §23.71, §23.72, denies Plaintiffs Trafelet, Canel, Nelson and Carey, who are otherwise qualified, and the members of their class the right to seek judicial office and also denies Plaintiffs Fitzpatrick, Williams and Lewis and the members of their class the right to vote for the judicial candidates of their choice and dilutes and nullifies their votes in the past. No compelling state purpose is cited in the Act, nor does a compelling state purpose exist for the denial of the above stated fundamental rights.

28. By reason of forced retirement, Plaintiffs Trafelet, Canel, Nelson, and Carey and the members of the class they represent will shortly be deprived of the right to hold their judicial office to the expiration of their respective terms and/or will shortly be deprived of the right to be eligible to seek retention or election to judicial office in the future.

29. By reason of forced retirement, Plaintiffs Nelson, Trafelet and Carey and the members of the class they represent are and will be deprived of the right to hold their respective offices until the completion of their respective terms, and therefore will suffer diminutions in income and be deprived of the opportunity to contribute to judicial service to which they have been elected by law and vote of the electorate. By reason of forced retirement Plaintiff Canel and the members of the Judges class represented by Plaintiffs are and will be deprived of the right to seek retention in elected office and therefore will suffer diminutions in income.

30. Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent will suffer physical and mental harm to their well-being by reason of the cessation of active employment in their chosen profession and the change in living conditions necessitated thereby.

31. Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent will experience pension payments smaller than those they would receive were they allowed to continue in or seek retention in their office. Moreover, these Judge Plaintiffs and members of the class they represent are barred from further contributing to their pension fund after retirement, thereby barring their ability to increase their retirement income.

32. By reason of the forced retirement of Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent, these Judge Plaintiffs and other judges are stigmatized by being in effect designated as unsuited for performing in their professions, thereby impairing their future employment opportunities.

33. By reason of forced retirement of Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent, these Judge Plaintiffs and other judges

are damaged in their standing in their communities by being discharged from their employment and thereby being in effect designated as unsuited for performing in their professions. No equivalent employment is, or will be, available to them following their forced retirement.

34. By reason of the forced retirement of Plaintiffs Nelson, Trafelet, Canel and Carey and the members of the class they represent, Plaintiffs Fitzpatrick, Williams and Lewis and the members of the class they represent are not able and will not be able to vote for the judicial candidates of their choice for the elected office of judge.

35. Defendants are acting and will continue to act under color of the laws of the State of Illinois to deprive Plaintiffs Trafelet, Canel, Nelson and Carey, and the members of the class they represent of rights secured by the First, and Fourteenth Amendments to the Constitution of the United States in that:

(a) These Judges are forced to retire solely because they have reached age 70, without any regard to their abilities to perform their assigned duties, and with no due process rights being accorded them, with the result being they are subjected to arbitrary, capricious, and irrational deprivation of their rights otherwise under law to hold judicial office and to seek retention of judicial office and to seek election to judicial office, without due process of law, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) These Judges are involuntarily classified in a class characterized solely on the basis of age and thence subjected to arbitrary and invidious treatment by reason of such classification, in that they are deprived of judicial office, deprived of the right to retain their judicial office and deprived of the right to seek election to judicial office, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(c) These Judges are being invidiously discriminated against because they are involuntarily retired and disqualified from holding judicial office and from seeking retention to judicial office and from seeking election to judicial office, all without any cause or procedural rights, on the sole basis of their having attained the age of 70, whereas (1) all other Judges can be removed only pursuant to the disciplinary provisions of the Illinois Constitution and Illinois Supreme Court Rules, and only after being accorded full due process rights including written charges, a hearing, representation by counsel, the opportunity to offer evidence and witnesses, maintenance of a record, and other procedural steps provided pursuant to the Illinois Constitution and procedures of the Judicial Board and Courts Commission; (2) many other judges have been and are protected by the "grandfather clauses" of the retirement act, so as to remain in office for 18 years, many years after attaining the age of 70; (3) other persons who qualify under Article 6, §11 to seek election to the judiciary may do so, whereas Plaintiffs and the class they represent are barred from doing so solely because of their age; (4) all other elected officials who reach the age of 70 in the State of Illinois are not so barred; (5) other judges are permitted to acquire longer years of service and therefore longer pension rights; and (6) other judges were protected by the savings clause enacted as amendement to §23.72 in 1973, so as to remain in office until achieving minimum retirement benefits, many years after attaining age 70.

(d) Many judges in the Judges' class are entitled to seek retention but did not file for retention by the first Monday in December, 1977, pursuant to Public Act 80-1057 as aforesaid because they believed themselves to be disqualified from retention by the mandatory retirement provisions complained of herein. Because they had only a few weeks to

file under that Public Act after it became effective, they had no conceivable time to seek within that period a declaration of their rights as prayed for herein. By cutting short the filing date for retention under Public Act 80-1057, rather than permitting such filing by May 7, 1978, as permitted by the Illinois Constitution, that Public Act acts in conjunction with the mandatory retirement provisions complained of to deny these members of the Judges' class their rights under the First, Fifth and Fourteenth Amendments for the reasons set forth in subparagraphs (a), (b), and (c) hereof.

36. Defendants are acting and will continue to act under color of the laws of the State of Illinois to deprive Plaintiffs Fitzpatrick, Williams and Lewis and the members of the class they represent of rights secured by the First and Fourteeenth Amendments to the Constitution of the United States in that duly registered voters are denied the opportunity to vote for the judicial candidates of their choice.

37. Both the Judge Plaintiffs and the Voter Plaintiffs and the members of the classes they represent have no adequate remedy at law to redress the wrongs alleged herein. All the Plaintiffs and the members of the classes they represent face imminent and irreparable injury from the actions of the Defendants, as set forth herein, unless restrained by this Court. An actual controversy exists between the parties hereto.

WHEREFORE, Plaintiffs Trafelet, Canel, Nelson and Carey pray that this Court certify them to be representatives of the class they represent and Plaintiffs Fitzpatrick, Williams and Lewis pray that this Court certify them to be representatives of the class they represent. All the Plaintiffs further pray that this Court enter judgment as follows:

A. That the Court declare the rights of the parties, including the Plaintiffs and the classes represented by them, and declare:

(1) that the Illinois Act relating to compulsory retirement of judges, Laws 1965, p. 1792, §1, §2, as amended by P.A. 78-805, §1 [Chapter 37, Ill. Rev. Stats. (1975) §23.71, and §23.72, as amended] both on its face and as applied, and also Public Act 80-1057, Chapter 46, Ill. Rev. Stats. (1975) §7A-1 as applied to the Judges' class herein, be declared in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, by reason of depriving Plaintiffs and their classes, under color of law, of their rights, privileges and immunities without due process, and further because such Act deprives them of their rights to equal protection of the law;

(2) that the offices of Plaintiffs Trafelet, Nelson and Carey and other judges in the class they represent who will not have completed their certified terms of office by December 4, 1978, are and will not be vacant, after that date or until the completion of their respective certified terms of office, by reason of the aforesaid Act for compulsory retirement;

(3) that the Plaintiff Canel, and other judges in the Judges class whose certified terms will expire December 4, 1978, are not disqualified by the aforesaid Act for compulsory retirement to seek retention in office pursuant to Article 6 of the 1970 Constitution of Illinois, and that the offices of such judges who timely file by May 7, 1978 Declarations of Candidacy with the Illinois Secretary of State to succeed themseves are not vacant or subject to election of others.

(4) that any elections to fill any and all vacancies in judicial office created by reason of the said Act relating to compulsory retirement of Judges are null, void, and of no effect; and

(5) that the Judge Plaintiffs and the class they represent are not disqualified by reason of said

Act from running for election to judicial office in Illinois, or for retention to judicial office in Illinois.

B. That the Defendants and each of them, and their agents, servants, and attorneys, be preliminarily *pendente lite* and then permanently restrained and enjoined as follows:

(1) As to all Defendants, from enforcing or recognizing by any official act on their part the requirements of the aforesaid Illinois Act relating to compulsory retirement of judges;

(2) As to the Defendant Governor Thompson, from issuing certificates of election to any persons purportedly elected to the supposed vacancies created by effect of the said Act relating to compulsory retirement of judges;

(3) As to the Defendants Board and Board Members and their successors, from certifying any vacancies in judicial office and by certifying names of individuals as candidates to such vacancies by reason of said Act relating to compulsory retirement of judges, and from certifying any election of persons supposedly elected to judicial offices made vacant by reason of said Act and from not including on the judicial retention ballots in November, 1978 and subsequent years Canel and all judges who timely filed Declarations of Candidacy with said Defendant pursuant to the 1970 Constitution of Illinois, and without regard to the said Act for compulsory retirement of judges and the filing date set forth in Public Act 80-1057.

(4) As to the Defendant Controller Bakalis, from causing the Judge Plaintiffs and the class represented by these Plaintiffs to lose their compensation for their judicial offices by reason of said Act, and from causing new persons purportedly elected to vacancies created by said

Act to be paid any compensation for those judicial offices;

(5) As to the Defendant Director Gulley, from causing the Plaintiffs Trafelet, Canel and Nelson Carey and the class represented by these Plaintiffs to be removed because of mandatory retirement from the payroll of judges and from causing others to be placed on that payroll in their stead.

(6) As to the Defendant Secretary of State Dixon, mandatorily enjoining him to timely certify to the State Board of Elections and all appropriate election officials for inclusion on the judicial retention ballots in November of 1978 and subsequent years all judges who timely file Declarations of Candidacy with said Defendant pursuant to the 1970 Constitution of Illinois, and without regard to the said Act for compulsory retirement of judges and without regard to the filing date provided in Public Act 80-1057.

C. For such other relief as may be just and equitable in the premises, and for their costs.

COUNT II

1. This Court has pendent jurisdiction of this Count. • • • •

No. 78-1917

Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

vs.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts, (Defendants); and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA, (Intervenors),

Respondents.

BRIEF FOR INTERVENOR-RESPONDENTS ALLEN HARTMAN, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, AND JAMES J. HEYDA IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 594 F. 2d 623. The opinion of the district court is reproduced at A. 2a.[1]

QUESTION PRESENTED

Whether this Court should grant certiorari to review a judgment rejecting an equal protection challenge to the Illinois Compulsory Retirement of Judges Act, *Ill. Rev. Stat.*, Ch. 37, §§ 23.71, 23.72, when no substantial federal question or conflict with a decision of this or any other court is presented.

STATEMENT

In 1965, the Illinois General Assembly enacted the Illinois Compulsory Retirement of Judges Act, *Ill. Rev. Stat.*, Ch. 37, §§ 23.71, 23.72 (hereinafter "the Act"). The Act provides for the mandatory retirement of Illinois judges at age 70. The express purpose of the legislation is "to insure a more vigorous judiciary to which the public is entitled." Rept. Judicial Advisory Council of Illinois, June 1963 at 9.

The Act was specifically authorized by the 1962 amendments to the Judicial Article of the Illinois Constitution of 1870. *Ill. Const.* 1870 Article VI, §18, as amended in the referendum of November 6, 1962. These amendments established judicial retention elections, whereby judges ran unopposed for reelection and had to obtain only a 60 percent favorable vote to remain on the bench. Retention elections were intended to afford Illinois judges greater security in office and to remove partisan politics from judicial elections.

[1] References (A.) are to Petitioners' Appendix herein.

Mandatory retirement was intended to complement retention elections and to provide an orderly system, whereby vacancies were created for increased citizen competition for and assumption of judicial posts. (A. 13a) The 1970 Illinois Constitution carried these goals forward. *Ill. Const.* 1970 Article VI, § 15(a). *See* S.H.A. Constitution, Article VI, § 15, Helman and Whalen, Constitutional Commentary.

In 1978, petitioners filed this suit in the Northern District of Illinois alleging that the Act violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. Intervenors, individuals who sought judicial positions that were to become vacant upon the retirement of judges pursuant to the Act, intervened to urge the constitutionality of the Act. (A. 10a) After trial, the district court held the Act constitutional, finding:

> Scientific observations since the 1940's have shown an association between age and decline in human intellectual function and personality factors during the sixth and seventh decades of life, between the ages of 65 and 75. These scientific observations had been published as of the time the Illinois General Assembly considered and enacted the Act. There was at that time, and continues to be, substantial scientific agreement about the fact of the associations which have been observed. These scientific observations sustain the retirement age of 70 for Illinois judges mandated by the Act. (A. 22a)

The Court of Appeals for the Seventh Circuit affirmed the judgment in every respect.

REASONS FOR DENYING THE WRIT

There Is No Conflict Of Decisions Or Substantial Federal Question Presented And The Decisions Below Are Correct

Petitioners' equal protection claims were disposed of by this Court in *Massachusetts Board of Retirement* v. *Murgia*,

427 U.S. 307 (1976), and, more recently, in *Vance* v. *Bradley*, ____ U.S. ____, 99 S.Ct. 939 (1979). *Murgia* held that mandatory retirement legislation is to be tested by the "relatively relaxed" rational-basis standard and found that a 50-year old mandatory retirement age for state policemen was reasonable. *Bradley* sustained a 60-year old mandatory retirement age for Foreign Service officers, holding that,

> In an equal protection case of this type ... those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker. 99 S. Ct. at 950.

The Act clearly meets this test. The express purpose of the statute is "to insure a more vigorous judiciary to which the public is entitled." Rept. Judicial Advisory Council of Illinois 9-10 (June 1963). After a week's trial and lengthy expert testimony, the district court found (to no one's surprise) an association between aging and a decline in the sixth and seventh decades of life in intellectual development and personality factors that bear on the judicial function. (A 22a-23a) As the Court of Appeals noted, while the defenders of the Act were not required to establish a rationality founded on empirical proof, *see Vance* v. *Bradley*, 99 S. Ct. at 950, n.28, they nevertheless met this more rigorous standard.

Further, there is no conflict between the decisions below and the decisions of other lower courts. Indeed, the Second Circuit recently rejected an equal protection challenge to the New York 70-year mandatory judicial retirement age (a statute practically identical to the Act here) and went so far as to characterize the plaintiffs' claim as "frivolous":

> We are of the opinion that the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that *the effort to clothe it in constitutional garb is frivolous. Rubino* v. *Ghezzi*, 512 F.2d 431, 433 (1975), *cert. denied*, (423 U.S. 891) (emphasis supplied).

Accord Weisbrod v. *Lynn*, 420 U.S. 940 (1975) (summary affirmance of dismissal of constitutional challenge by HUD attorney to a Federal law mandating retirement at age 70); *O'Neil* v. *Baine*, 47 U.S.L.W. 2075 (Mo. Sup. Ct. July 11, 1978) (mandatory retirement for magistrates and probate judges at age 70); *Aronstam* v. *Cushman*, 325 A.2d 361 (Vt. 1974) (supreme court and all subordinate court judges at age 70); *Nelson* v. *Miller*, 480 P.2d 467 (Utah 1971) (trial judges at age 70).

Nor does the Seventh Circuit's decision conflict with this Court's ballot access decisions in *Illinois State Board of Elections* v. *Socialist Workers Party*, ____ U.S. ____, 99 S.Ct. 983 (1979) and *Bullock* v. *Carter*, 405 U.S. 134 (1972). Those cases invoked "strict scrutiny analysis" to invalidate statutes that discriminated against discrete, identifiable minorities. Here the 70-year retirement age is a general restriction that discriminates against no insular voter minority. Indeed, if petitioners' novel analysis is correct, we doubt that the Constitution's 35-year minimum age qualification for the presidency (U.S. Const. Article II, § 1, cl. 5) or the two-term restriction (U.S. Const. Amend. XXII) could pass equal-protection muster.

Finally and signally, Illinois does not stand alone in enacting mandatory judicial retirement legislation. Forty-two states have so provided, 30 of them setting age 70 as the maximum for judicial tenure. *See* Cross-Jurisdictional Survey of Mandatory Judicial Retirement filed by Defendant-Respondents State Board of Elections (May 8, 1978). Moreover, the United States Congress has carefully examined the retirement area and has adopted the 70-year mark as the governing national mandatory retirement age.

See Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256. The collective judgments of these deliberative bodies removes any doubt as to the rational foundation of the Illinois Compulsory Retirement of Judges Act.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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